TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 463

THOMAS I. FITZGERALD, PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, ETC., PETITIONER,

vs.

UNITED STATES LINES COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 26, 1962
CERTIORARI GRANTED DECEMBER 10, 1962

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[fol. A]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 26716

ANDRES SAN MARTIN, Plaintiff-Appellant,

against

UNITED STATES LINES COMPANY,
Defendant-Appellee and Third Party Plaintiff,

against

UNITED STATES OF AMERICA, Third Party Defendant.

Plaintiff-Appellant's Appendix

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[fol. 1]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ANDRES SAN MARTIN, Plaintiff,

against

UNITED STATES LINES COMPANY, Defendant.

STATEMENT UNDER RULE 15(b)

Suit was commenced by filing of Summons and Complaint on June 23, 1955. Issue was joined by service of Answer on March 1, 1956.

Third-Party Complaint was filed on December 31, 1957. Third-Party Answer was filed on October 30, 1958.

Trial with a jury, before Hon. Richard H. Levet, U. S. D. J., was held on May 12, 13, 16, 17, 18, 19 and 20, 1960.

Third-Party action was discontinued on May 19, 1960.

Verdict on the jury issues was entered for the defendant on May 20, 1960.

Hearing on the issues reserved to the Court alone were held before Hon. Richard H. Levet, U. S. D. J., without a jury, on June 14, 20, 22, and 23, 1960.

Final Judgment for the plaintiff in the amount of $224, plus interest, was filed on September 6, 1960.

Notice of Appeal was filed by the plaintiff on September 30, 1960.

[fol. 2]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

COMPLAINT—Filed June 23, 1955

Plaintiff Demands a Jury Trial

To the Honorable Judges of the United States District Court for the Southern District of New York:

Complaint by Seamen Under Special Rules for Seamen to Sue, Without Costs of Prepayment of Fees.

For a First Cause of Action

First: Upon information and belief that at all times hereinafter mentioned, the defendant was and still is a domestic corporation duly organized and existing under and by virtue of the Laws of the State of New York.

Second: Upon information and belief that at all times hereinafter mentioned, the defendant was and still is a foreign corporation duly licensed to do business within the State of New York.

Third: Upon information and belief that at all times hereinafter mentioned, the defendant had an office for the [fol. 3] transaction of business in the Borough of Manhattan, City and State of New York.

Fourth: Upon information and belief that at all times hereinafter mentioned, the defendant owned or leased a vessel known as the SS "American Reporter".

Fifth: Upon information and belief that at all times hereinafter mentioned, the defendant operated the said vessel.

Sixth: Upon information and belief that at all times hereinafter mentioned, the defendant was in possession and control of the said vessel.

Seventh: That at all times hereinafter mentioned, the plaintiff was employed on the said vessel by the defendant as a wiper.

Eighth: That at all times hereinafter mentioned, the plaintiff became a member of the crew of the said vessel.

Ninth: Plaintiff elects to maintain this action under the provisions of Section 33 of the Merchant Seamens Act as of June 5, 1920 C. 250 41 Stat. 1007 otherwise known as the Jones Act.

Tenth: That by reason of the unseaworthiness of the said vessel and the negligence of the defendant, its agents, servants and employees on or about the 6th day of November, 1954 while plaintiff was assigned to carry barrels of cement on the gangway of the said vessel, he was caused to twist and strain his back and he thereby sustained severe and painful personal injuries.

Eleventh: Upon information and belief that the said injuries were directly caused by the negligence of the de- [fol. 4] fendant, its agent, servants and employees, in failing to furnish a seaworthy vessel and appliances; sufficient and competent co-employees and superior officers; proper tools and equipment and to keep same in repair; a safe place in which to work; in failing to promulgate and enforce proper and safe rules of seamanship and supervision of said work; and in failing to warn plaintiff of impending dangers and perils.

Twelfth: That by reason of the unseaworthiness of the said vessel and the negligent failure of the defendant, its agents, servants and employees as aforesaid, the plaintiff has been caused to sustain severe and painful injuries; has and will require hospital and medical care; has been and will be disabled and confined to his home and hospital for a long period of time; has lost and will lose large sums of money which he otherwise would have earned.

Thirteenth: The defendant, its agents, servants and employees were further negligent, careless and reckless in failing to provide the plaintiff with timely, adequate, proper

and competent medical care and attention and maintenance and cure, thereby aggravating his condition.

Fourteenth: Upon information and belief that said injuries were not caused or contributed to by any fault or want of care on the part of the plaintiff.

Wherefore plaintiff demands judgment against the defendant in the sum of $75,000.00 together with the costs and disbursements of this action.

For a Second Cause of Action

Fifteenth: Repeats and realleges each and every allegation hereinbefore stated with the same force and effect as if the same were again herein set forth in full.

[fol. 5] Sixteenth: Upon plaintiff's becoming ill and injured as aforesaid, it became the duty of the defendant to furnish plaintiff with prompt medical care, attention and medicines, the expense of his maintenance and cure, his earned wages and wages to the end of the voyage.

Seventeenth: That said defendant has neglected and failed to pay him the expense of his maintenance while incapacitated, all his maintenance and cure, his earned wages and wages to the end of the voyage.

Wherefore plaintiff demands judgment against the defendant in the sum of $10,000.00 together with the costs and disbursements of this action.

Benjamin Glickman, Attorney for Plaintiff, Office & P. O. Address, 305 Broadway, Borough of Manhattan, City of New York.

[fol. 6]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil No. 101-310

[Title omitted]

ANSWER

The defendant United States Lines Company answering the complaint by its attorneys, Kirlin, Campbell & Keating alleges upon information and belief as follows:

As to the First Cause of Action

First: It admits that at the times mentioned in the complaint, the defendant was and still is a corporation. It denies each and every other allegation contained in paragraph numbered First of the complaint.

Second: It admits that at the times mentioned in the complaint the defendant was and still is a foreign corporation. It denies each and every other allegation contained in paragraph numbered Second of the complaint.

Third: It admits that at the times mentioned in the complaint the defendant had an office in the Borough of Manhattan, City and State of New York. It denies each [fol. 7] and every other allegation contained in paragraph numbered Third of the complaint.

Fourth: It admits that at the times mentioned in the complaint the defendant owned a vessel known as the S.S. "American Reporter". It denies each and every other allegation contained in paragraph numbered Fourth of the complaint.

Fifth: It admits the allegations contained in paragraph numbered Fifth of the complaint.

Sixth: It admits the allegations contained in paragraph numbered Sixth of the complaint.

Seventh: It admits that at the times mentioned in the complaint one Andres San Martin was employed as a wiper aboard the S.S. "American Reporter". It denies that it has any knowledge or information thereof, sufficient to form a belief, as to whether the plaintiff was at any time its seaman employee within the meaning of the Act of Congress of June 5, 1920, Section 33 and within the meaning of the Act of Congress of April 22, 1908, Chapter 149. It denies each and every other allegation contained in paragraph numbered Seventh of the complaint.

Eighth: It admits that at the times mentioned in the complaint one Andres San Martin was employed aboard the S.S. "American Reporter" as a member of the crew. It denies that it has any knowledge or information thereof, sufficient to form a belief, as to whether the plaintiff was at any time its seaman employee within the meaning of the Act of Congress of June 5, 1920, Section 33 and within the meaning of the Act of Congress of April 22, 1908, Chapter 149. It denies each and every other allegation contained in paragraph numbered Eighth of the complaint.

[fol. 8] Ninth: It denies that it has any knowledge or information thereof sufficient to form a belief as to the allegations contained in paragraph numbered Ninth of the complaint.

Tenth: It denies each and every allegation contained in paragraph numbered Tenth of the complaint.

Eleventh: It denies each and every allegation contained in paragraph numbered Eleventh of the complaint.

Twelfth: It denies each and every allegation contained in paragraph numbered Twelfth of the complaint.

Thirteenth: It denies each and every allegation contained in paragraph numbered Thirteenth of the complaint.

Fourteenth: It denies each and every allegation contained in paragraph numbered Fourteenth of the complaint.

As to the Second Cause of Action

Fifteenth: Defendant repeats and realleges each and every answer and denial contained in paragraphs numbered

First to Fourteenth of its answer, with the same force and effect as though fully set forth at length herein and, in addition thereto, alleges as follows:

Sixteenth: It denies each and every allegation contained in paragraph numbered Sixteenth of the complaint.

Seventeenth: It denies each and every allegation contained in paragraph numbered Seventeenth of the complaint.

As a First Defense

Eighteenth: The complaint fails to state a claim upon which relief can be granted.

[fol. 9]

As a Second Defense

Nineteenth: That, if the plaintiff sustained any injuries, as alleged in the complaint, said injuries were caused in whole or in part by plaintiff's own negligence and were not caused or contributed to in any manner by any negligence of the defendant.

As a Third Defense

Twentieth: That the injuries to the plaintiff, if any, arose out of certain risks, dangers and hazards, all of which were open, obvious and well known to the plaintiff at and before the said injuries were sustained and all of said risks, dangers and hazards had been assumed by the plaintiff.

As a Fourth Defense

Twenty-first: That, if the plaintiff sustained any injuries as alleged in the complaint, said injuries were caused in whole or in part by plaintiff's own failure to perform the duties assumed as a term of his employment.

Wherefore, the defendant demands that the complaint be dismissed with costs to the defendant as against the plaintiff and that the Court grant to the defendant such other, further and different relief as the justice of the cause may require.

Kirlin, Campbell & Keating, By: Joseph M. Cunningham, A Member of the Firm, Attorneys for Defendant, Office & P. O. Address, 120 Broadway, New York 5, New York.

[fol. 10]

Excerpts of Testimony

The Court: Now, Mr. Friedman, do you have a claim here still for maintenance and cure? Is that in or out?

Mr. Friedman: That is in.

The Court: I will direct that that be tried to the Court only, and if there is any additional testimony necessary, I will hear that after the jury has rendered its verdict.

Mr. Friedman: I will respectfully except.

. . . . . .

Mr. Friedman: I don't know if it was made a part of the record yesterday, but, as your Honor recalls, it is the plaintiff's position that a jury demand was made in both causes of action.

The Court: Was there?

Mr. Friedman: I understand that it is the practice of this district to choose whether to submit this matter to a jury or to withhold it to the Court itself—

The Court: Are you talking about maintenance and cure?

Mr. Friedman: That is correct, maintenance and cure. I spoke of the case on the authority of Jenkins v. Walker, which is, of course, a First Circuit case in the District of Massachusetts, and in the discussion of that case by the Supreme Court in Romero v. International Terminal.

I respectfully submit that this is not a threshold in law but this is a matter of choice for the District Court, with all due respect. So the law, for the time being, is that a maintenance and cure count is a count founded in common-law. It is a remedy or right that accrues to a seaman from ancient history that existed prior to the establishment of the admiralty jurisdiction of the Federal Court, and it is also a matter to be brought on the law side, and, in fact, in the State Court, as is frequently done there, they elect

[fol. 11] to demand a jury. A jury has been duly demanded. The plaintiff is entitled to a jury on this action which is properly before this Court on a common-law basis. It may well be that he could have chosen to come here on an admiralty basis for maintenance and cure and so bar himself from a jury except to the extent that the Court would wish to call upon an advisory jury.

The Court: Is that all?

Mr. Friedman: Yes.

The Court: Well, it is my opinion that in this court, in the Second Circuit, it is permissible and authorized to try maintenance and cure to the Court. The only thing you said, Mr. Friedman, that has anything to do with this circuit is the possibility of Romero, and the Supreme Court cases have done something to the practice in this circuit. As I recall it, the cases definitely permit the trial to the Court of maintenance and cure in this circuit.

* * * * * * *

Andres Romero San Martin, the plaintiff herein, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Friedman:

Q. What is your name?

A. Andres Romero San Martin.

Q. Mr. San Martin, when were you born?

A. 1897, December 31st.

Q. And where were you born?

A. In Spain.

Q. Mr. San Martin, have you ever worked as a seaman?

A. Since 1917.

Q. Now when did you come to the United States, Mr. San Martin?

A. 1915.

[fol. 12] Q. Since the year 1917 have you worked steadily as a seaman?

Mr. Danahar: The testimony was 1915.

The Court: That is when he says he came to the United States, Mr. Danahar.

Mr. Danahar: I am sorry.

The Court: And he served as a seaman, I believe he said, since 1917.

Q. Have you worked steadily as a seaman?

A. You mean since 1917?

Q. Yes.

A. Yes, sir.

Q. Now, did there come a time when you joined the crew of the SS American Reporter?

A. Yes, sir.

Q. And can you tell us in what year you joined the crew of the SS American Reporter?

A. In 1953; November 3rd of 1953.

Q. And what job did you have on the SS American Reporter?

A. I was a wiper.

Q. And in what city or port did you begin to work on the SS American Reporter?

A. Here in New York.

Q. Now for how long a period of time did you continue to serve on the SS American Reporter?

A. Until December 15, 1954.

Q. During the period from November 3, 1953, to November 5, 1954, was there any time that you did not work while you were on the SS American Reporter other than the days you were off duty?

A. I always worked on board.

Q. Do you recall the SS American Reporter arriving in the Port of New York on or about November 5, 1954?

The Court: Just yes or no.

A. I don't remember exactly.

[fol. 13] Mr. Friedman: I call for the deck log.

The Court: Well, maybe it will be conceded.

Mr. Danahar: I will concede it.

The Court: All right, it is conceded.

Q. On November 5, 1954, were you a member of the crew of the SS American Reporter?

A. Yes.

Q. Can you tell us whether or not during that day you signed any articles of any kind aboard the ship?

The Court: Yes or no.

A. I believe it was the 6th that we signed articles.

Q. In what part of the ship did you go through the process of signing the articles?

A. In the messroom, the officers' messroom.

Q. Do you recall what part of the day that signing on took place?

The Court: Does that make any difference?

Mr. Friedman: Yes, it does.

The Court: All right.

A. I believe it was 3 o'clock in the afternoon, 2 or 3 o'clock in the afternoon.

Q. Did you receive any orders to do any work aboard the ship at or about that time?

A. Yes.

Q. And what orders did you receive?

Mr. Danahar: I object to that unless we first establish from whom he received the orders.

The Court: Yes, from whom. First, from whom did you receive these orders.

The Witness: I received the orders from the engine utility.

[fol. 14] The Court: From what?

The Witness: Engine utility.

The Court: I don't know what that means.

Mr. Friedman: That is a—

The Court: No, he is going to testify.

Q. Do you recall the name—by what name you referred to that man?

A. Luis Manzo.

Mr. Friedman: Your Honor, I believe it will be conceded that Luigo Manzo was a member of the crew.

The Court: Is that so?

Mr. Danahar: Yes, sir.

Q. What orders, if any, did Luigo Manzo give you aboard the ship that day?

Mr. Danahar: Objection, your Honor.

The Court: On what ground?

Mr. Danahar: I don't think he is bound by an order of an engine utility man.

The Court: I don't know what the position is. I don't know what authority he had. If you don't show it—

Mr. Friedman: I just don't want to make a representation before the jury. May I approach the bench, if your Honor please?

The Court: Yes.

(The following took place at the bench not within the hearing of the jury.)

Mr. Friedman: The answer to the interrogatory states that the order was given through Arthur Quellmalz, the first assistant engineer of the ship. That is in the interrogatories.

[fol. 15] Mr. Danahar: I will concede that the first assistant engineer ordered Manzo to bring these stores aboard.

Mr. Friedman: All right.

Mr. Danahar: I will concede that, but I am not conceding any particular orders that Mr. Manzo might have given these men. I don't think that the defendant is bound by them. He is not an officer of the ship.

The Court: He is not an officer or non-commissioned officer or anything?

Mr. Danahar: No, your Honor.

Mr. Friedman: If it is a question of fact, we can prove it through the interrogatories that it was the general custom—

The Court: That may be general but you must also prove, I should think, that the orders came from this person.

Mr. Friedman: The interrogatories concede that the first assistant engineer directed that this cargo of four 100-pound drums and one 200-pound drum be loaded or carried aboard the gangway from the dock.

The Court: Why didn't you say that in the first place?

Mr. Friedman: That was conceded in the interrogatories.

The Court: Well, that will have to be read because otherwise it would not be before the jury.

Mr. Friedman: I did not want to interrupt the testimony.

The Court: All right, interrupt it and read it.

(The following took place within the hearing of the jury.)

* * * * * * *

[fol. 16] Mr. Friedman: I will start with Question 5:

"State whether or not on November 6, 1954, the S S American Reporter was loading or discharging cargo."

The answer by the United States Lines Company is:

"Loading."

Question 6—I think, if I may interrupt here, your Honor—

The Court: Well, what do you want to say?

Mr. Friedman: I want to say that counsel has stipulated that the date of the—

Mr. Danahar: Your Honor, I don't think that Mr. Friedman should be making these statements before the jury.

The Court: I don't think so either. If you want to confer privately and then make a stipulation, all well and good, but don't come out with an ex parte stipulation. They are not made that way. You confer and agree and if you have a stipulation then you may state it. I am not concerned with it. Just talk to him off the record.

(Mr. Friedman and Mr. Danahar confer at the rear of the courtroom.)

The Court: Have you agreed on something?

Mr. Friedman: Yes.

The Court: All right.

Mr. Friedman: It is stipulated that the date claimed for this alleged accident is Friday, November 5, 1954 rather than November 6, 1954. That is all.

The Court: Is that in the pleadings?

Mr. Friedman: It was on Friday—

[fol. 17] The Court: I am asking you a simple question.

Mr. Friedman: Well—

The Court: It is not conceded that anything happened, but it is conceded that the alleged date is November 5th and the pleadings are amended accordingly; is that so?

Mr. Friedman: Yes.

The Court: And is it so stipulated?
Mr. Friedman: Yes.
The Court: Go ahead.
Mr. Friedman: Question 6:

"With reference to the S/S American Reporter, on November 6, 1954 state whether there were any barrels of cement loaded aboard said vessel."

The answer to the question is: "Yes."

Question 7:

"If the answer to the preceding interrogatory is in the affirmative, state the number of barrels of cement which were loaded aboard said vessel and the weight of each barrel."

The answer is:

"Four 100-pound drums and one 200-pound drum."

Question 8:

"State whether plaintiff was assigned to load barrels of cement aboard the S/S American Reporter on November 6, 1954."

The Court: Is this changed to November 5th now?
Mr. Friedman: That's correct.
The Court: Read it as though it were changed.
Mr. Friedman: The answer is "Yes."

[fol. 18] Question No. 9:

"If the answer to the preceding interrogatory is in the affirmative, state the name and address of the person on behalf of the defendant who ordered plaintiff to load barrels of cement aboard the S/S American Reporter on November 5, 1954."

And the answer is:

"Arthur Quellmalz, 190 Riverside Drive, Denville, New Jersey."

The Court: Suppose you spell that last name.
Mr. Friedman: Q-u-e-l-l-m-a-l-z.

And if I may refer back to Question No. 4 of the interrogatories:

> "State the names, Coast Guard certificate numbers and addresses of the following officers and members of the crew of the S/S American Reporter covering period including November 6, 1954" and (c) is: "First assistant engineer."

The answer to (c) is "Arthur Quellmalz."

The Court: All right, he is the first assistant engineer. What is next? Is that all from the interrogatories now?

Mr. Friedman: No, the next one is 10.

> "State the names and addresses of all other members of the crew who were assigned to load barrels of cement aboard the S/S American Reporter on November 5, 1954."

The defendant's answer to that question is:

> "Luigo Manzo (deceased); Ralph Murrell, 1063 Teller Avenue, Bronx, New York; Jose A. Rosales, [fol.19] 19 East 118th Street, New York, N. Y.; Andres San Martin."

And the next question is:

> "If the answer to interrogatory No. 8 is in the affirmative," which was, "state whether the plaintiff was assigned to load barrels of cement."
>
> "State the means by which such barrels of cement were brought aboard said vessel."

The Court: That is, the way in which they were brought aboard, irrespective of what the order was? Is that it?

Mr. Friedman: Yes.

The Court: All right.

Mr. Friedman: Answer to No. 11:

> "Rolled or carried by crew."

The Court: All right. Next.

By Mr. Friedman:

Q. Now, the testimony was you signed certain articles in the messroom and received certain orders. Now, what work did you do that afternoon on November 5, 1954, if any.

Mr. Friedman: I will withdraw that question.
The Court: It is withdrawn.

Q. Where did you go from the messroom, if any place, on the afternoon of November 5, 1954?
A. I went to load the barrels of cement from the dock.
Q. Now, did you go to the dock, sir?
A. Yes.
Q. What did you find on the dock when you got there?
A. There were four or five barrels of cement and a few other packages.
Q. Approximately how far was this material from the gangway of the ship to the dock?

[fol. 20] The Court: The cement, I assume you mean.
Mr. Friedman: The cement, the material.

A. About four or five feet from the dock to the gangway.
Q. What did you do with the barrels of cement?
A. I picked up one and brought it on to the ship.
Q. Who else, if anybody, was present at that time and at that place?
A. There were three wipers there and the engine utility man.
Q. Did you have any conversation with the engine utility man?

Mr. Danahar: If your Honor please, I ask that the witness be instructed to answer that question yes or no.
The Witness: Yes or no.

A. Yes.
Q. What did you say to him?

Mr. Danahar: Objection, your Honor.
The Court: Sustained.

Q. Did you receive any instructions from the engine utility man?

Mr. Danahar: Objection, your Honor.
The Court: Sustained.
Mr. Friedman: I note my exception.

Q. What did you do, if anything, after you carried aboard this barrel of cement?
A. I went down to the dock and started to load another one.
Q. Was the gangway between the dock—strike that.
Where was the gangway attached to on the ship?
A. At the side of the ship.
[fol. 21] Q. Along what hatches?
A. Between the third and fourth, I believe.
Q. Was the gangway at an angle?

The Court: What is that?

Q. Was the gangway at any angle?
A. It was tied with the line.

Mr. Danahar: I did not get that.
The Court: He says it was tied with the line, whatever that means, and whether that is at an angle.

Q. Can you show us or tell us—

The Court: Make it one or the other.

Q. Was there any person in charge of your work in carrying these stores from the dock up to the main deck?
A. Yes, the engine utility man.
Q. And his name is—

Mr. Danahar: I object to that.
Mr. Friedman: Well, it is conceded.
The Court: Just ask him what his name was; don't lead him.
Mr. Danahar: Your Honor, I would also ask your Honor to instruct this witness to answer yes or no to questions because—
The Court: I have so indicated and I will ask him to do it again through the interpreter. Mr. San Martin, I instruct you to answer the questions that are asked and no other questions. If it calls for a yes or no answer, just give it that way.
The Witness: All right.

Q. Do you know who, if anybody, put the engine utility man in charge of this loading operation?

[fol. 22] The Court: Of his own knowledge.

Q. Do you know who if anyone put the engine utility man in charge of this loading operation?

A. Yes.

Q. And who was that?

A. The first assistant.

Q. The first assistant what?

A. (In English) The first assistant engineer.

The Court: He can speak more English than appears.

Mr. Friedman: Those words are used on a ship.

The Court: He understands some English.

Mr. Friedman: Yes.

Q. Now, I ask you, Mr. San Martin, what instructions, if any, did you receive regarding loading these stores and from whom?

Mr. Danahar: I object to that.

The Court: Of course, you have not shown how this was known to him. He gave the title of first assistant engineer, but I assume something was either heard or said by him and you will have to elicit that.

Mr. Friedman: Again I think that goes—

The Court: I said you have to elicit it, Mr. Friedman. I don't want any more argument about it. If you want to abandon that, then I would sustain the objection. You take your choice.

Q. How do you know, if you do—

The Court: The point is, did he hear anything said by the first assistant to the utility engineer or the engine utility man, I believe it is.

Did you hear some conversation between the first assistant engineer and the utility man, yes or no.

[fol. 23] The Witness: Yes.

The Court: What was it? What was said?

The Witness: That he gave orders to him to have these barrels of cement loaded on.

The Court: Is that all?

The Witness: Nothing else.

Q. Mr. San Martin, was there any other way other than carrying these barrels of cement up the gangway to bring them from the dock to the deck?

A. Yes.

Q. What other way was that?

A. With the winch.

Q. And were any winches provided to you to use for this loading job on November 5, 1954?

Mr. Danahar: I object to that.

The Court: I will allow it.

Mr. Danahar: I think it is too general.

The Court: I will allow it. This may be difficult with the witness. You may cross-examine.

A. No.

Q. Mr. San Martin, did you carry a second barrel of cement up the gangway on November 5, 1954?

A. Yes, sir.

Q. How did you carry it?

A. Holding it over here (indicating).

The Court: Indicating what?

The Witness: On the left.

The Court: On the left shoulder?

The Witness: On the left shoulder.

Q. What if anything happened while you were carrying this barrel of cement?

A. Yes, something happened.

Q. Tell us what.

A. When I was carrying this barrel of cement the barrel moved—and the gang place ladder moved. I had to hold [fol. 24] on to the line of the ladder, and I was moving like this, back and forth. That is all I know.

Mr. Danahar: May we have for the record, your Honor, how he was moving.

The Court: How were you moving?

The Witness: From one side to the other—from one side to the other.

Q. Did you feel any pain at this time?

Mr. Danahar: Objection, your Honor, as leading.

The Court: I don't know what happened. Have you elicited all that happened? He moved from side to side?

The Witness: Yes.

The Court: Now the next is, did he suffer pain?

Mr. Friedman: Yes.

The Court: Well, if that is all, if you are through with that part of it, I will allow this question. I don't know what it means but that is for the jury. Go on.

Q. Did you experience any pain?

A. Yes, sir.

Q. Where?

A. In the back and my left leg.

Mr. Danahar: Your Honor, may we have the witness indicate where on the back he felt pain.

The Witness: Yes. Indicate where on your back. Stand up.

(Witness indicates.)

The Court: He indicates a little above the waist. Is that so, Mr. Friedman? Will you give some attention here. He is indicating, I say, a little above the waist. Does that satisfactorily describe what he has indicated?

[fol. 25] Mr. Friedman: Yes.

The Court: What about the leg, before you sit down.

The Witness: Along the entire leg, sir.

The Court: And he is pointing to the thigh—the upper thigh of the left leg.

Mr. Danahar: In the back, your Honor.

The Court: Towards the rear.

The Witness: Well, I say in my back, but my spine and along my entire leg.

Q. Did the barrel fall down at this time?

Mr. Danahar: Objection, your Honor.

The Court: Sustained as leading.

Q. What if anything happened to the barrel?

A. It fell down to the deck.

Q. What did you do next?

A. At that time the first assistant engineer came along.
Q. And then what happened?
A. And I told him that the work was dangerous.

The Court: Is that all you told him?
The Witness: From what I recall, nothing else.

Q. And what did you do after that?
A. I went down and went to work on the others.
Q. And what type of material did you go to work on then?
A. Light weight objects.
Q. And how much longer did you work that day?
A. Until about a quarter of 5.
Q. And did you do any work on the next day?
A. No, it was a Saturday, and the following Sunday, no work.
Q. And were you on the ship the next day, that is, a day after this accident, the carrying aboard of the barrels of [fol. 26] cement, were you on the ship or off the ship?
A. I was aboard.
Q. And how long did the ship remain in New York?
A. I believe it sailed on Monday.

Mr. Friedman: I believe it will be conceded that November 5, 1954, was a Friday.
Mr. Danahar: Yes.
The Court: I assume it is stipulated that it sailed on the 8th, if it makes any difference. Does it appear anywhere at all?
Mr. Danahar: What is the question?
The Court: He wants to know the date of sailing.
Mr. Danahar: From where?
The Court: From New York.
Mr. Danahar: Well, if your Honor please, I think it left the Brooklyn Army Base and went to some other place in New York. As a matter of fact, he can put the log book in evidence and I have no objection.
The Court: Put it in and then you will have it all before you.
Mr. Friedman: All right.
The Court: Plaintiff offers the log book, no objection, mark it in evidence.

(Received and marked Plaintiff's Exhibit 1 in evidence.)

Mr. Friedman: This is the deck log book, Voyage No. 54 of the SS American Reporter, which runs from Sunday, October 24, 1954, to December 9, 1954.

This log book shows that it arrived at Brooklyn Army Base on Friday, November 5, 1954, in the morning, was secured to the pier at the Brooklyn Army Base at nine [fol. 27] minutes after 8 in the morning on Friday, November 5, 1954.

The log book also shows an entry that at 1345, which is 1:45, the United States Shipping Commissioner came aboard on Friday, November 5, 1954.

The Court: You don't need to give all of those details. Let us get on. The ship, I suppose, left that night some time.

Mr. Friedman: Yes, it left the Brooklyn Army Base on Sunday, November 7th at 6:40 in the morning.

Mr. Danahar: And from the Brooklyn Army Base it went to a pier on the Hudson River that day, Sunday, November 7, 1954, and in the evening of that day departed from the Hudson River on a voyage to Europe to the Port of London. That is confirmed by what is in the log. Is that right?

Mr. Friedman: Yes.

Mr. Danahar: Do you agree, Mr. Friedman?

Mr. Friedman: Surely.

The Court: All right, let us get on with this.

Q. Were you aboard the SS American Reporter during this voyage when it left New York on or about November 7, 1954?

A. Yes.

Q. What was your job during that voyage?

A. I continued doing my work in the engine room.

Q. And tell us whether during that entire voyage did you miss any work at all?

A. Yes.

Q. Did you miss any work on the voyage from New York to London?

The Court: He just said yes.

Q. From New York to London?

A. No.

[fol. 28] Q. Did you miss any work on your return voyage from London to New York?

A. Yes.

Q. And why did you miss work?

A. I was sick.

Q. And can you describe your sickness?

A. My back hurt.

Q. And can you tell us when that back pain started?

A. From the moment that I had that accident on the gangway.

Mr. Danahar: I move to strike that out, that he had an accident.

The Court: Yes, strike it out. The time is an essential feature of the answer. Was it on November 5th?

The Witness: Yes, sir.

Q. And can you tell us whether the pain changed in any way during the period from November 5, 1954, to December of 1954?

A. Yes, sir.

Q. And in what way did it change?

A. I felt much worse.

Q. Now did you—answer this yes or no—did you tell anyone about this pain?

The Court: Anyone?

Q. I just want a yes or no for that. Did you tell anyone on board the ship of this pain?

Mr. Danahar: I object to that, your Honor.

The Court: Yes, he might have told half the crew.

Mr. Friedman: I don't want to lead.

Q. Did you tell any security officer aboard the ship about your pain?

A. Yes, sir.

[fol. 29] Q. Who did you tell?

A. The first engineer.

The Court: When?

The Witness: When the boat was on its return voyage.

The Court: When on the return, how long out of London?

The Witness: I really can't tell you exactly what day it was. I would say a day or two out of London.

Q. Was there any reason why you didn't tell it before that day?

Mr. Danahar: Objection, your Honor.

The Court: Sustained.

Q. Why did you tell him then?

Mr. Danahar: Objection, your Honor.

The Court: Sustained.

Mr. Friedman: I offer in evidence the medical log of the SS American Reporter.

The Court: Just relating to this?

Mr. Friedman: Solely.

The Court: What is the date?

Mr. Friedman: There are two dates, 12-4-54 and 12-15-54. It is one line. They go by name.

The Court: All right, read it in if there is no objection.

Mr. Danahar: There is no objection.

The Court: Read it.

Mr. Friedman: I would like to offer it in evidence itself, your Honor.

The Court: I said read it. You don't need to offer a whole book if it is just a line that you want. There is no [fol. 30] doubt what is in there so just read it and that makes it in evidence.

Mr. Friedman: (Reading) Name, San Martin; give crew rating, wiper; date and hour injury or illness originated, 12-4-54; disease or injury, sprain, light pain still present at right leg—

Mr. Danahar: That is the second entry you are reading, not the first one.

The Court: You better offer the whole thing then so that there is no error. I thought you said it was a line but it is obviously more than a line. Just that portion relative to this, plaintiff will be marked in evidence. You may read the rest of it, if there is any more.

Mr. Danahar: Yes, there is, your Honor.

Mr. Friedman: Under date of discharge, blank. Condition of patient on discharge, that is blank. Time off for duty in bay, none.

Master's certificate issued and man relieved for coastwise and foreign voyage.

Under the heading, "Was accident report made?" "Yes."

I am going to read another entry in the same book of an earlier date. Andres San Martin—

The Court: What date is this?

Mr. Friedman: Well, apparently 12-5-54. Wiper. Date and hour injury or illness originated, 12-4-54. Date treated, 12-5-54. Disease or injury: soreness in muscle or right leg. Date of discharge, blank. Oil of Wintergreen and heat.

Was accident report made? Yes.

Mr. Danahar: Why don't you finish the answer, Mr. Friedman?

The Court: If you are going to read it, read all of it.

[fol. 31] Mr. Danahar: Isn't there something else that appears there?

Mr. Friedman: What else?

Mr. Danahar: Doesn't the word "No" also appear there?

Mr. Friedman: We offer this in evidence, your Honor.

The Court: Yes, and now if there is any part that has not been read, Mr. Danahar, you may read it.

(Received and marked Plaintiff's Exhibit 2.)

The Court: The jury may examine it.

Mr. Danahar: I am now reading from the last entry that Mr. Friedman read from.

Under the column, "Was accident report made out," there also appears the word "No," and over the word "No" there appears the word "Yes." So which was put in first I don't know.

Mr. Friedman: We certainly don't know that, your Honor. Let the jury decide.

The Court: We will have a recess at this time, just for about five minutes.

(Recess.)

The Court: All right, Mr. Friedman.

Mr. Friedman: I just received a deposition and I want one minute to find a page.

The Court: What is that for? You have a witness in the box.

Mr. Friedman: It is a point that we are right on now.

The Court: All right. It is a little bit ragged to do it this way. Is this a deposition in this case?

Mr. Danahar: Yes, it is, your Honor.

The Court: May I see it?

[fol. 32] Mr. Friedman: We just received this yesterday afternoon and it was only taken last Friday.

The Court: All right, start in. What page are you on?

Mr. Friedman: Page 63, your Honor.

The Court: You better start in with who he is first.

Mr. Friedman: This is the deposition taken before trial of one William McManus, at this time the captain and at the time of the accident the first officer or the chief officer.

The Court: Is that in the record somewheres?

Mr. Friedman: Yes, I believe so.

Mr. Danahar: I will concede that.

The Court: All right, it is conceded.

Mr. Friedman: And Mr. McManus testified as a representative of the shipping company on a deposition which he duly swore to on that date, some time last month.

The Court: May 6th; it was not last month.

Mr. Friedman: I am sorry, and I now quote from this portion of Captain McManus' deposition. This is at page 63:

"Q. Do you know whether he received medical attention or treatment of any kind aboard the ship?"

The Court: Where is that?

Mr. Friedman: At the bottom of page 63 the third question up.

The Court: All right.

Mr. Friedman: "Do you know whether he received medical attention or treatment of any kind aboard the ship?

[fol. 33] "I do know that he did get medical treatment. It was listed in the ship's medical log. I know that from reading the log during the voyage.

"Q. And when a man reports an injury what then occurs, do you make out an accident report of any kind?

"A. That is correct.

"Q. And what is done with that accident report that is made out?

"A. Well, a copy is kept in the vessel's records, and the original and the rest of the literature and paraphernalia connected with it are sent to our office in New York at the end of the voyage."

The Court: Is that all now from McManus?

Mr. Friedman: I now ask—

The Court: I said, is that all now from Mr. McManus?

Mr. Friedman: Yes.

The Court: All right.

Mr. Friedman: I now ask, your Honor, for the production of that accident report by this shipping company.

The Court: Mr. Danahar?

Mr. Danahar: Your Honor, I have been trying since I received this case for handling to locate that accident report and I have been unable to do so.

The Court: Are there any traces of it?

Mr. Danahar: No, sir.

The Court: All right, that is your answer.

Mr. Danahar: I might also point out that I think it is immaterial because—

The Court: Well, we won't go into that now.

[fol. 34] By Mr. Friedman:

Q. Where did the voyage end, Mr. San Martin, in what port?

A. Here in New York.

Q. And did you obtain any document of any kind from the ship's officers before you left the ship?

A. Yes, sir.

Q. And what was that document?

A. A letter to the hospital.

Q. And after leaving the ship did you go to the hospital?

A. Yes.

Q. What hospital was that you went to first?

The Court: What hospital did you go to?

The Witness: Hudson & Jay.

Q. And did you see a doctor there?

A. Yes.

Q. And did you tell him anything in regard to any pain you may have had?

A. Yes.

Q. What did you tell him about your pain?

A. I told him about the pain I was suffering in my back and my left leg.

Mr. Friedman: If I may hold the questioning for a moment, the jury hasn't completed examining the medical log.

The Court: All right.

Mr. Friedman: Will your Honor tell the jury there are two pages?

The Court: There are two entries, one on the 4th of December and one on the 5th, I believe.

Mr. Friedman: I believe one is on the 5th and on the 15th, your Honor.

The Court: Is that right? That was not my understanding but I may be wrong. They speak for themselves. They are on two separate pages and one follows the other, I believe.

[fol. 35] Mr. Friedman: Yes, your Honor, if we could attach a clip to the pages—

The Court: All right, attach a clip. There is a check mark, I think, made on each item with a pencil.

Go on now, Mr. Friedman.

Q. Mr. San Martin, did the purser aboard the SS American Reporter in November and December, 1954, speak Spanish to you?

The Court: What is this, did he speak Spanish?

Mr. Friedman: Yes, the Spanish language.

A. No.

Q. And did you, Mr. San Martin, at any time ever write in that medical log?

A. No.

The Court: Do you speak some English?

The Witness: (In English) Yes, a little.

Mr. Danahar: What was that answer, please?

The Court: "A little."

Q. Now at the Hudson & Jay Clinic, did the doctor ask you how long you had the pain?

Mr. Danahar: Yes or no, please, your Honor.
The Court: Just yes or no.

A. Yes.
Q. And what did you tell him?

Mr. Danahar: Objection, your Honor.
The Court: Is this something that is different from the log or rather, the record of Hudson & Jay? Is that the point?
[fol. 36] Mr. Friedman: Well, it is—as to that question, no, your Honor.
The Court: Then why don't you offer the Hudson & Jay record?
Mr. Friedman: I won't go into it too much, your Honor.
The Court: All right, sustained.

Q. Did the doctor ask you how the pain began?

Mr. Danahar: Objection, your Honor.
The Court: Sustained. I suppose there is a record of it there. If there is some question about it, then you can go further but it seems to me to be anticipatory.

Q. What did you tell the doctor with regard to how long you had pain?

Mr. Danahar: I object to that.
The Court: Sustained—it is the same question—unless it is something that was stated to the doctor who was treating him. Go on with this case and we will get along faster.
Mr. Friedman: Supposing it was the treating doctor—
The Court: At Hudson & Jay they did not just look at him, did they? And this, by the way, I assume is conceded to be a public health clinic, is it not?
Mr. Danahar: Yes, sir.
The Court: And both sides so concede and stipulate that that is so.
Mr. Danahar: Yes, where [illegible] get free treatment.
The Court: Yes, that is conceded by both sides.

[fol. 37] Q. After the Hudson & Jay Clinic, did you go to any other medical institution?

A. No, sir.

Q. Were you ever at the medical institution at Staten Island, at the Marine Hospital at Staten Island?

A. Yes, sir.

Q. And do you recall when you went there?

A. I believe it was the 20th of December of 1955.

Q. Then some time after you got off the ship you went to Hudson & Jay Clinic and then afterwards to the Staten Island Marine Hospital, is that correct?

The Court: He said December, 1955.

Mr. Friedman: 1954.

The Witness: I am sorry, I meant 1954.

(A short pause.)

The Court: Next question, if there is going to be any.

Q. How long did you stay at the Staten Island Marine Hospital approximately?

A. About two months.

Mr. Danahar: Your Honor, may I confer a minute with Mr. Friedman? I think he is somewhat mistaken about this.

The Court: Why don't you put the records in?

Mr. Danahar: I have no objection to these photostats going in subject to confirmation with the original records when they get here.

The Court: Do you want to offer them?

Mr. Friedman: I will put them in.

The Court: You offer a photostat of the record of the Marine Hospital, is that right?

Mr. Friedman: There are two exhibits there, by the way, one Hudson & Jay and the other Marine Hospital.

(Received and marked Plaintiff's Exhibits 3 and 4.)

[fol. 38] The Court: I would like to see them unless you want to use them.

Mr. Friedman: Yes, I will want to use them.

The Court: All right, you take them then.

Mr. Friedman: The date of admission to the Staten Island Hospital, United States Public Health Service Hospital at Stapleton, Staten Island, is January 12, 1955, and

the date of discharge is March 1, 1955, and the number of days hospitalized is 48 days.

Does your Honor want these now?

The Court: I want to see you go on and ask some questions and see if we can get through with this witness.

Q. After you left the hospital on March 1, 1955, where did you go?

A. I went to the company.

Q. Well, where did you go to live?

A. 433 19th Street.

The Court: Manhattan or Brooklyn?

The Witness: West 19th Street, Manhattan.

Q. Now since 1955 until today where have you lived, in what city?

A. I now live at a different address but most of the time I lived there.

Q. And what type of home do you have there?

Mr. Danahar: I object to that.

Q. Was this a hotel or a furnished room or an apartment of your own?

Mr. Danahar: Objection. I don't see the materiality.

The Court: Sustained. I don't know what difference this makes.

[fol. 39] Mr. Friedman: Does your Honor want a discussion—

The Court: No, I don't want a discussion. I want you to get on with this case. I have sustained the objection. I don't know what that has to do with it.

Q. Did you engage in any employment from the time you left the hospital on March 1, 1955, until today?

The Court: Just yes or no.

A. No.

Q. Did you live with any other people during this time?

Mr. Danahar: Objection, your Honor.

The Court: Sustained.

Mr. Friedman: I would like to make an offer, your Honor.

The Court: Well, you will have to make it later. Go on.

Q. After you left the hospital did you have any feelings of pain of any kind?

A. Yes.

Q. And describe those pains, please?

A. In my back and in my left leg.

Q. Did you see any doctors during that time?

The Court: This is after—

Mr. Friedman: After he left—

The Court: —after he left the hospital on March 1, 1955.

The Witness: Yes, sir.

Q. And what were the recommendations of these doctors with regard to your working?

[fol. 40] Mr. Danahar: Objection, your Honor.

The Court: Sustained.

Q. Now, Mr. San Martin, going back to the gangway on November 5, 1954, I would like, if you would, to describe the construction of that gangway; tell us what it was made of.

The Court: He observed it, I suppose. You have to lay some groundwork for this.

Q. On November 5, 1954, were you at any time on the gangway?

The Court: Just yes or no.

The Witness: Yes.

Q. Tell us what you observed from your observation; tell us, describe to us the construction of this gangway.

The Court: Did you look at the gangway, yes or no.

The Witness: No.

Q. Did you walk on the gangway?

A. Yes, sir.

Q. Were your eyes open or closed while you walked on the gangway?

A. Open.

Q. Tell us what you saw.

The Court: He said he didn't see the gangway. I don't know if he can tell what he saw if he didn't see it.

A. It was in this manner; it was about on an angle of 25 degrees.

[fol. 41] The Court: An angle of 25 degrees?

The Witness: 25 degrees and it had lines.

Q. Where were these lines?

A. Right alongside the gangway, one on top and one below.

Q. What were these lines made of?

A. I believe it would be rope.

The Court: Did you look at it, yes or no?

The Witness: No.

The Court: Then how is he going to tell what it looked like or what it was made of.

Q. How far apart—strike that. You say it was one rope above the other—

The Court: Are you going to lead him now?

Mr. Friedman: I am just stating this, your Honor.

Q. How many lines of ropes were there?

The Court: I don't know that he has testified that they were rope.

Mr. Friedman: He just said so, your Honor, if I can have read back the last two or three questions.

The Court: He testified he didn't look at it.

Did you look at anything on the gangway, yes or no.

The Witness: I certainly look at it when I am walking down.

The Court: That does not answer the question. Did you look at the gangway at any time?

The Witness: Yes.

The Court: What did you see, if anything, on the sides of the gangway or above the gangway?

The Witness: Cords, rope.

The Court: Cords?

[fol. 42] The Witness: It could be cord, rope or line.

The Court: All right, go on.

The Witness: One on the top, one on the bottom, on both sides.

The Court: All right.

Q. Can you tell us whether those ropes were taut or loose?

Mr. Danahar: Objection, your Honor. That is a leading question.

The Court: Yes, sustained.

Q. Tell us what was the condition of those ropes.

A. They are not very taut; somewhat slack.

Q. As you went up the gangway carrying the drum of cement, the second drum, did you come into contact with the rope handrail?

Mr. Danahar: Objection, your Honor.

The Court: Sustained.

Q. Can you tell us what use, if any, you made of the handrail as you carried the second drum of cement up the gangway?

A. Well, when I was moving from side to side I grabbed hold of the handrail with my hand.

Q. When did you move from side to side?

A. When I was going up with the barrel.

Q. Why did you move from side to side?

Mr. Danahar: I object to that, your Honor.

The Court: Sustained.

Q. What if anything caused you—

The Court: Isn't that just about the same question?

[fol. 43] Mr. Friedman: Yes, your Honor, but I must say, very respectfully, I fail to see the objection which relates to this question.

The Court: Ask your question.

Q. Did you move from side to side when you carried the first barrel of cement up the gangway?

A. No.

Q. What if anything was different at the time you carried the second drum of cement up the gangway?

A. Well, when I went up with the second barrel it seemed that the gangway was not moored properly and it moved.

Mr. Danahar: I object to that.

The Court: Strike out that it was not moored properly.

Mr. Greco: I join in that objection.

The Court: The gangway moved. That is all that is admissible.

Q. What happened when the gangway moved?

A. Well, at that time, when the gangway moved, I moved from side to side with the barrel of cement on my shoulder, and at that time I felt a pain in my back.

The Court: How did the gangway move?

The Witness: Well, I say that it moved from side to side. There may have been some wind—

The Court: Strike out that there may have been some wind. He says it moved from side to side. Is that your answer?

The Witness: Yes, it moved from side to side.

The Court: All right.

Q. Now before November 5, 1954, Mr. San Martin, did you ever have any pain in the lower part of your back and in your left leg?

A. No, sir.

[fol. 44] The Court: Never?

The Witness: No, never.

Q. Do you have any such pain at this time?

A. Yes, at this very moment—

The Court: Yes or no.

The Witness: Yes, sir.

Q. Describe those pains, please, to us? I don't mean at this particular moment but I mean—

The Court: When do you mean?

Q. Do you have these pains all the time, every minute of the day, or does it come and go?

A. I have it ... the time, sir.

Q. Describe to us, if you would, just how and what the pain is.

A. Right in the back and my left leg, along my entire left leg.

Q. Do you ever pick anything up?
A. No.
Q. Are you able to bend down without feeling pain?
A. No, no.
Q. Did you receive any money other than your wages from the shipping company—let me withdraw that.
After the end of the voyage, when you went to the shipping company's office, tell us what happened there.

Mr. Danahar: Your Honor, I object to that.
The Court: I don't know what the purpose of this is.
Mr. Friedman: It is a matter of payment. We have to prove what demands were made and what was received.
The Court: That question calls for a conversation, I suppose.
[fol. 45] Q. Did you receive anything, not conversation, did you receive anything at the shipping company office?

Mr. Danahar: I object, your Honor. I don't see the materiality of it.
The Court: Sustained.

Q. Other than the medical treatment at Hudson & Jay and Staten Island Hospital, did you pay anybody else—

The Court: First, did he get any other treatment.

Q. Did you receive any treatment from any other doctor?

The Court: Yes or no.

A. I don't understand the question.
Q. Did you go to see any other doctors? Did you go to see any doctor since March, 1955, in your neighborhood or anywhere else?
A. Yes.
Q. And why did you go to see these d ctors?

Mr. Danahar: Objection, your Honor.
The Court: If it relates to this alleged injury I will allow it.
Was it about your back or your leg or what?
The Witness: Yes, certainly, my back and my leg.

Q. What treatment if any—

The Court: Fix the time and the name of the doctor before you get to the treatment, instead of operating in a vacuum.

[fol. 46] Q. Do you recall the name of the doctor you went to see?

A. Yes, Dr. Lucas. I don't know the first name—Dr. Lucas.

Q. About how many—

The Court: Will you fix the time, Mr. Friedman?

Q. Do you recall the time—give us your best approximation of the time you went to see Dr. Lucas, when?

A. I don't recall the month but it was in 1955.

Q. Did you ever go to see him after 1955?

A. Yes.

Q. Was that in the year 1956?

A. Yes.

Q. Did you ever go to see him after the year 1956?

A. Yes.

The Court: Is this doctor going to be here?

Mr. Friedman: No, your Honor, unless Mr. Danahar will stipulate that—

The Court: I am not discussing that. He went to Dr. Lucas some time in 1955 and some time in 1956. That is all that we have so far.

Q. Did you see him at all in 1957?

A. Yes, sir.

Q. And was this in connection with any pains to your back?

A. Yes, always for the same reason, pain in my back and my left leg.

Q. And what treatment did Dr. Lucas give you?

A. He just gave me some pills.

Q. And what did you pay to him, if anything?

A. I paid him $5 for each visit.

The Court: And all he did was give you pills is that right?

The Witness: That's right, nothing else.

Mr. Friedman: Your Honor, may I come up?

[fol. 47] The Court: I wish this case would proceed without these interruptions from time to time. It should have been prepared.

(Conference at bench not within the hearing of the jury and off the record.)

(The following took place within the hearing of the jury.)

The Court: Go on.

Q. At the place where you lived since leaving the hospital in March, 1957—

The Court: Make it a specific place.

Q. At 433 West 19th Street—

The Court: Have him testify.

Mr. Friedman: He did testify to that.

The Court: All right, go on. Don't argue with me.

Q. Was there anybody else living with you? What kind of a dwelling was it? What type of accommodations did you have there?

The Court: I am allowing this only if it is connected and if it is shown to be something that necessarily flowed from this alleged accident or alleged physical condition as a result thereof. If it is not shown I will strike the testimony out.

A. I had a room there.

Q. Now, who took care of your room in cleaning it up?

A. The janitor.

The Court: Did the janitor do it for everybody else?

The Witness: Sure.

[fol. 48] Q. Did you—

Mr. Danahar: Your Honor, as long as he did it for everybody else I don't think that it is material—

The Court: I don't see what basis you have for it, but go on. I hope that you will try to get a little facility in progressing here.

Q. Now, Mr. San Martin, did you live with anybody else or did you live in another place besides 433 West 19th Street since you left the hospital in March, 1955?

A. Yes.

Q. Now, Mr. San Martin, did you do your own shopping?

The Court: I don't see any background for that. You will have to lay some groundwork for it. He walked to court today, and from the rear of the courtroom he walked into the witness box.

Mr. Friedman: Well, if your Honor means that—

The Court: I am not telling you what you should do but there ought to be a groundwork for it, if you expect to get this testimony in. I am not going to run your case for you.

Q. Do you do your own shopping, Mr. San Martin?

A. No, sir.

The Court: There are a lot of men who do not do their own shopping, so what does that show?

Mr. Friedman: It only goes to the weight of the evidence.

The Court: Get some proof instead of talk. I am going to recess now until 2 o'clock, and by that time I hope that you will have some questions ready for this witness.

Don't discuss this case.

(Recess to 2 P. M.)

[fol. 49] Afternoon Session 2 P. M.

The Court: You may go on, Mr. Friedman.

ANDRES ROMERO SAN MARTIN resumed.

Direct examination.

By Mr. Friedman (Continued):

Q. Mr. San Martin, would you describe to us as of the last time you worked aboard the SS American Reporter

what your duties and activities aboard the SS American Reporter were?

A. The last job that I had was loading these barrels.

Q. So that you worked—did you work as a wiper aboard the SS American Reporter?

A. Yes.

Q. Tell us the things you did, the work you did as a wiper aboard the SS American Reporter?

A. Painting, washing down and scraping.

Q. How many hours a day did you work?

A. Eight hours.

Q. Now since you left the SS American Reporter have you done any work?

A. No.

Q. Why not?

Mr. Danahar: Objection.

The Court: Yes, in that form.

Q. What have you done, what activities have you had?

Mr. Danahar: Objection.

The Court: Well, he said that he has not worked, so what difference does that make?

Mr. Friedman: I think it makes a difference.

The Court: Suppose he is engaged in fishing, I don't know.

Mr. Friedman: I think the question of what activity, if any, he is permitted to do, may be of some relevance.

[fol. 50] The Court: What you want to ask about of course is his physical condition, I assume.

Mr. Friedman: I seek to elicit, if your Honor please—

The Court: All right, ask your own questions. I sustain the objection to the last question.

Q. What is your physical condition at this time, Mr. San Martin?

The Court: From your own observation.

A. I feel ill.

The Court: All right, he feels ill.

Q. Would you describe the illness that you feel?

A. I cannot walk very much; I can't go up and down very much.

Q. How much walking do you do?

A. Three or four or five blocks, something like that.

Q. What happens after you walk three or four or five blocks?

A. I have to sit and rest.

Q. Do you climb any stairs?

A. No, I just go to the first floor.

Q. How do you feel after you climb to the first floor?

A. I feel tired.

The Court: You go up one flight of stairs?

The Witness: Yes.

The Court: How many times a day?

The Witness: Once or twice.

Q. What do you do besides walking three or four or five blocks?

A. I go back upstairs, I lie down for awhile, I get up and watch television, and then rest again.

Q. And about how much time a day do you spend resting?

A. I would say three quarters of the day.

[fol. 51] Q. Does anybody help take care of you?

A. Yes.

Q. What help does he give you?

A. He helps me in every way. He cleans around the apartment and he cooks and prepares the meals.

Q. Now, Mr. San Martin, with regard to this barrel of cement, the drum of cement that you testified you carried up the gangway on November 5, 1954, do you know what that material was used for aboard the SS American Reporter?

A. This would be for the furnace.

Q. In what way is it used in the furnace?

A. The cement is used for the flat, the bottom of the furnace, as well as the brick portion of the furnace.

Mr. Friedman: Now I ask to have marked for identification as Plaintiff's Exhibit No. 5 this metal drum.

(Marked Plaintiff's Exhibit 5 for identification.)

Q. Now, Mr. San Martin, will you come down from the witness stand and take a look at Plaintiff's Exhibit No. 5 for identification.

The Court: Can't he see it from here?

Mr. Friedman: I don't know.

The Witness: I can see it from this point.

Q. Can you tell us, Mr. San Martin, in your observation what it is?

A. I believe that that is the cement.

Q. Can you tell us whether this drum is identical in size and shape with the drums that you carried up the gangway on November 5, 1954?

A. Yes, exactly.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Friedman: I offer it in evidence.

The Court: Any objection?

Mr. Danahar: Yes, I do, sir. I think we should know the weight of it—

The Court: Know the weight?

[fol. 52] Mr. Danahar: Yes, sir.

The Court: I don't know about its contents and nobody has said anything about that.

Mr. Danahar: All right.

The Court: Objection sustained. They are of the same size and shape. It may be admitted without any concession as to the weight, if you limit it that way.

Mr. Danahar: I have no objection on that basis.

The Court: It is admitted on that basis, but not as to the weight, but as to the same size and shape. As to weight, I suppose there would have to be some proof.

(Plaintiff's Exhibit 5 for identification received in evidence.)

Mr. Friedman: Perhaps I better consult with you on this.

The Court: Well, some of these consultations are not necessary.

Mr. Friedman: I can represent to the Court that I personally ordered a 100-pound drum of Brickram cement from the General Refractories Company, which was delivered here this morning.

The Court: Now do you know that the other was the same?

Mr. Friedman: It is conceded that the other was 100 pounds.

Mr. Danahar: That is true.

The Court: Do you want to take his representation?

Mr. Danahar: I will take his representation, your Honor, but I still want to know whether that weighs 100 pounds. It might be 150 pounds for all we know. The only true way to find out is to weigh the thing.

Mr. Friedman: Some time before the trial is over we can get some technique of weighing it.

fol. 53 Mr. Danahar: I accept Mr. Friedman's statement that he ordered this and that they told him it was 100 pounds but what it actually is I do not know.

The Court: Well, that is up to you to prove the weight.

Mr. Friedman: We will try to do it some time before the trial is over.

The Court: All right. Is there any more direct examination?

Mr. Friedman: I have no further questions at this time.

* * * * * * *

[fol. 73]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 101-310

ANDRES SAN MARTIN, Plaintiff,

against

UNITED STATES LINES COMPANY, Defendant and Third Party Plaintiff,

against

UNITED STATES OF AMERICA, Third Party Defendant.

FINAL JUDGMENT—August 30, 1960

The above entitled action having come on for trial before Honorable Richard H. Levet and a jury, and the issues with respect to plaintiff's claim for maintenance and cure reserved for trial by the Court without a jury, and the third party complaint having been dismissed at the close of the evidence in the jury trial by consent, without costs, and the jury having rendered a special verdict with respect to plaintiff's claims for negligence and unseaworthiness in answer to special interrogatories, as follows:

Special Verdict

1. Was the order of the defendant, under all the facts and circumstances thereof, to bring the drum of cement up the gangway on November 5, 1954 a negligent order? No.

[fol. 74] 2. Was the SS American Reporter unseaworthy? No.

If your answer to either No. 1 or No. 2 is in the affirmative, answer No. 3. If they are in the negative, your verdict is for the defendant.

3. Was the plaintiff injured either as a result of obedience to said order or the unseaworthiness of the vessel?

4. (a) If your answers to either No. 1 and No. 3 or No. 2 and No. 3 are in the affirmative, to what award, if any, is the plaintiff entitled for pain, suffering and disability from the date of the accident to the present time as a result of injuries referred to in No. 3?

(b) To what award, if any, is the plaintiff entitled for lost earnings from December 15, 1954 to the present time as a result of injuries referred to in No. 3?

Note: The net earnings after taxes of the plaintiff are to be considered here.

(c) To what award, if any is the plaintiff entitled for pain, suffering and disability which he allegedly will endure in the future as a result of the injuries referred to in No. 3 and for any future reasonable medical expenses which he will incur as a result of the injuries referred to in No. 3?

(d) For how many years from today forward do you estimate that plaintiff would have been able to work but for the injuries referred to in No. 3 and despite other physical handicaps?

(e) What, if anything, is the annual amount of wages which plaintiff would have earned from today forward but for the injuries referred to in No. 3 and despite other physical handicaps?

[fol. 75] Note: The net earnings after taxes of the plaintiff are to be considered here.

(f) What, if anything, is the annual amount of future wages which plaintiff may reasonably be expected to earn from today forward despite the injuries referred to in No. 3 and despite other physical conditions from which he may suffer?

(g) Deducting the sum arrived at in answer to (f) above from the sum arrived at in answer to (e) above, what, if anything is the annual amount of earnings which will be lost to plaintiff in future years as a result of the injuries referred to in No. 3?

5. If your answers to either No. 1 and No. 3 or No. 2 and No. 3 are in the affirmative, did the plaintiff by any negli-

gent conduct contribute in any degree to the injuries referred to in No. 3?

6. If your answer to No. 5 is in the affirmative, to what extent did plaintiff's negligent conduct so contribute to the injuries referred to in No. 3?

Note: In answering this question state your answer as a percentage.

And the Court having directed judgment with respect to the said claims for negligence and unseaworthiness in accordance with said special verdict

And the Court having filed its opinion, findings of fact and conclusions of law with respect to plaintiff's claim for maintenance and cure, dated June 29, 1960, granting judgment for the plaintiff in the sum of $224 with interest on each day's allowance, such interest in each day's allowance to be computed for the period commencing on such day and running to the date of actual payment, it is

[fol. 76] Ordered and Adjudged that plaintiff's claims for personal injuries based upon negligence and unseaworthiness, be and are hereby dismissed, with prejudice, and without costs, and it is further

Ordered and Adjudged that plaintiff recover of and from the defendant, for maintenance and cure, the sum of $224 with interest on each day's allowance, such interest on each day's allowance to be computed for the period commencing on such day and running to the date of actual payment, without costs, and it is further

Ordered and Adjudged that the third party complaint be dismissed, without costs.

Dated: New York, New York,
Aug. 30, 1960.

Richard H. Levet, U. S. D. J.

Rec'd in Clerk's office 9/6/60.

Judgment Entered this 6 day of September 1960.

Herbert A. Charlson, Clerk.

[fol. 77]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT NEW YORK

Civil 101-310

ANDRES SAN MARTIN, Plaintiff,

against

UNITED STATES LINES COMPANY, Defendant.

OPINION BY LEVET, D. J.—June 30, 1960

Appearances:

Benjamin Glickman, Attorney for Plaintiff, 305 Broadway, New York, N. Y.

Jacob Rassner, Counsel for Plaintiff, 15 Park Row, New York, N. Y.; Theodore H. Friedman, of Counsel.

LEVET, D. J.:

The first cause of action herein was an action under the Jones Act (46 USCA 688), based upon the alleged negligence of the defendant and upon the alleged unseaworthiness of the vessel. This issue was tried to the court and jury and a verdict thereon rendered for the defendant.

The second cause of action, for maintenance and cure, was tried before the court. All relevant testimony taken before the jury and subsequently before the court has been considered.

After hearing the proofs and evidence of the parties, and after examining the pleadings, exhibits, briefs and requests to find submitted, I find as follows:

[fol. 78]

FINDINGS OF FACT

1. Plaintiff, a seaman, born December 31, 1897, was employed aboard the defendant's vessel, the SS American Reporter, as a crew member in the capacity of a wiper from on or about November 3, 1953 to December 15, 1954.

2. The defendant, United States Lines Company, is a corporation doing business within the State of New York. Through the aforesaid period of employment said defendant owned, operated, managed and controlled the said SS American Reporter.

3. Prior to said employment by defendant, plaintiff was given a pre-employment physical examination by defendant's physicism and was accepted for employment. The ordinary pre-sign-on examination would not have revealed the aneurysm hereinafter referred to. A chest x-ray would have been required.

4. In 1945, plantiff was told that he had contracted syphilis. This went untreated for a number of years and had produced an aneurysm of the ascending aorta of plaintiff's heart and heart failure for which he was subsequently treated by a private doctor, Dr. Frank Spindler, from March 2, 1952 to September 18, 1953. Dr. Spindler informed plaintiff of his said ailments and indicated he might work at his calling.

5. The plaintiff at no time disclosed to defendant the fact that he had syphilis or that syphilis had produced an aneurysm of the ascending aorta and heart failure.

6. On December 5, 1954, while the ship was at sea, the plaintiff reported to the purser complaining of pains in his lower back and left leg, which condition plaintiff said originated on November 4, 1954; as a result the plaintiff [fol. 79] became disabled and unfit for duty aboard said vessel on December 13, 1954. On December 15, 1954, after further complaints, plaintiff requested a hospital slip, and a master's certificate was that day issued to him to obtain "treatments of rheumatic pains in leg."

7. While plaintiff served on the SS American Reporter, there were no manifestations of his cardio-vascular condition or any complaints from him relating thereto; his sole purpose in signing off the vessel on December 15, 1954 was to obtain treatment for his leg.

8. Plaintiff was treated as an out-patient for said complaints and pains at the United States Public Health Service Out-Patient Clinic at 67 Hudson Street, New York,

N. Y., from December 20, 1954 to January 12, 1955, and as an in-patient at the United States Public Health Service Hospital at Stapleton, Staten Island, New York, from January 12, 1955 to March 1, 1955. Here, the sole complaint of plaintiff was "pain in the muscle of the left calf for 2 months."

9. During the course of these treatments at the Marine Hospital at Hudson & Jay Streets, New York, N. Y., the aneurysm of the ascending aorta was noted.

10. There is no evidence that plaintiff's condition relating to his cardio-vascular system, i.e., the enlargement of the cardiac vessels, became disabling during the period of plaintiff's service aboard defendant's vessel or that the service of plaintiff aboard such vessel aggravated such condition.

11. The plaintiff was admitted to the United States Marine Hospital at Stapleton, Staten Island on January 12, 1955 and he remained there until discharged on March 1, 1955. The diagnosis there was (1) aneurysm of aorta due to [fol. 80] arteriosclerosis; (2) herniation of nucleus pulposus due to unknown cause; (3) syphilis of undiagnosed site. The prognosis was guarded and the disability was stated "not fit for duty indefinitely." The plaintiff denied chest pain and upon admission to the Marine Hospital made no complaint with respect to his cardio-vascular condition. He was held not to be a candidate for surgery (as to the herniation) because of the aneurysm.

12. The plaintiff's condition relating to his back and left leg, i.e., the herniation of the nucleus pulposus at the L5-S1 level at the left, arose while plaintiff was in the service of the defendant's vessel and on or about November 4, 1954.

13. At the time of his discharge from the Marine Hospital on March 1, 1955, plaintiff had reached the point of maximum possible cure as to his back condition. There was no further treatment which could have improved his condition.

14. On March 1, 1955, the plaintiff had reached the maximum cure as to the cardio-vascular condition; and on October 30, 1957 and April 28, 1960 was not suffering from congestive heart failure. (See testimony of Dr. Eugene Clark.)

15. The plaintiff has not received any medical treatment for his back or cardio-vascular conditions since his discharge from the Marine Hospital at Stapleton, Staten Island, New York on March 1, 1955.

16. The plaintiff is entitled to recover maintenance and cure at the rate of $8.00 per day from December 15, 1954 to January 12, 1955 (28 days) for a total of $224.00.

[fol. 81] Discussion

The testimony of the principal witnesses is as follows:

Dr. Irving Mauer, an orthopedic surgeon of considerable standing, testified upon behalf of plaintiff.

He testified that when he examined the plaintiff on May 2, 1960, he found the following conditions: Limitation of back motion; limitation of straight leg raising; weakness; absence of the left ankle jerk; weakness of the left extensor halluois longus with hypasthesia over the lateral aspect of the left leg extending to the lateral aspect of the foot. He also found varicosities affecting both lower extremities; atrophy of the left thigh and atrophy of the left calf; tenderness along the spinous and interspinous ligaments.

Mr. Mauer stated that in his opinion the plaintiff had not reached the maximum cure with respect to his back.

The treatment which he recommended is the so-called "conservative treatment" consisting of (1) wearing a brace; (2) physiotherapy; and (3) injection of vitamin B-12. These treatments would cover periods of from one year to 18 months, and apparently would cost between $1,420 and $2,120. During the treatment recommended, the exercise tolerance would have to be built up by reason of the cardiac situation. This treatment, in the opinion of Dr. Mauer, would partially restore the plaintiff to a condition in which he might work at non-arduous tasks such

as an elevator operator, an assembler of parts or a job conducted in a sedentary manner.

Dr. Mauer reiterated the above opinion in spite of the fact that the hospital records of the Marine Hospital indicated that on March 1, 1955 the patient, San Martin, had received maximum hospital benefits and in spite of the further fact that Dr. Mauer was a member of the staff of that hospital at that time, although it appears [fol. 82] that he was not one of the reporting examiners as to this particular patient.

Dr. Irwin Balensweig, who is an orthopedist and traumatic surgeon, testified in substance as follows:

He examined the plaintiff on June 25, 1956 and on May 13 1960 and he stated that he had reviewed the hospital records and taken certain X rays.

The hospital records at the Marine Hospital indicated that at the time of discharge San Martin had reached maximum hospital benefits, and Dr. Balensweig said that in his opinion also San Martin had reached maximum medical treatment benefits at that time. He indicated that there would be no benefit from further therapy treatments now; that a brace would not correct the herniated disc, if there were one, and that the injection of vitamin B 12 were not used in the treatment of backs. Dr. Balensweig concluded by stating that there was nothing to do for San Martin except that San Martin should adapt himself to his complaints.

Dr. Frank Spindler, an internist and general practitioner, testified that he treated the plaintiff some 82 times from March 4, 1952 to September 18, 1953, treating both a syphilitic condition and a heart condition. He talked to the plaintiff about his heart condition and advised hospitalization.

However, on or about September 18, 1953, Dr. Spindler examined the plaintiff, who then complained only of nervousness. Dr. Spindler then gave it as his prognosis that the plaintiff could work.

Dr. Spindler examined the plaintiff again on May 27, 1960. "I again took his blood pressure; it was 150 systolic

over 90 diastolic. I listened to the heart. He had an enlarged heart, regular beat, 100 per minute. He had an aortic systolic murmur and an aortic diastolic murmur. The apex of the heart was displaced to the sixth interspace about 4 centimeters to the left of the nipple. I again [fol. 83] fluoroscoped him and he demonstrated this time the enlargement of the heart, but with two densities, the density I described originally to the right ventricle and another density on the arch of the aorta, which, without doubt, is an aneurysm. I weighed him. I gave him some treatment."

Dr. Spindler testified that San Martin had not reached the maximum cure for the cardio-vascular condition and he recommended the following treatment: Treatment would consist of what Dr. Spindler called "compensation," by the removal of the fluid from the tissues of the body, either from the base of the lung or the extremities, upper or lower, or at any other soft tissue parts of the body. The method used is the standard mercurial diuretics together with new agents found within the last year. This treatment, the doctor said, would require from three to five years. In the beginning the treatment would be weekly for about two months and then after that monthly. The minimum time would be three years. The cost, he said, would be $10.00 per treatment, including medication.

Dr. Eugene Clark, a specialist in heart and cardio-vascular matters, testified that he examined the plaintiff on October 30, 1957 and on April 27, 1960. He also made X-rays, cardiographs, took blood tests and made a urine analysis. He said the aneurysm was the size of a fist and would have required a development of ten years before December 1954 and that the cause of this aneurysm was syphilis. He also said that the ordinary pre-sign-on examination would not have revealed the aneurysm; that a chest X-ray was required to discover this.

Dr. Clark testified that there was no indication at the time of the Hudson & Jay Street Hospital clinical records, December 20, 1954 to January 6, 1955, or the Marine Hospital record or on his examination of October 30, 1957 or on his last examination on April 27, 1960 that the plaintiff was suffering from congestive heart failure.

[fol. 84] DR. HYMAN ARENBERG, who is a specialist in internal medicine and cardiology, testified for the plaintiff.

Dr. Arenberg said that he had examined plaintiff on June 23, 1960 and that, in his opinion, plaintiff was now suffering from congestive heart failure; that he has an aneurysm of the arch of the aorta of long standing.

The doctor testified that treatment of the plaintiff should be administered to diminish the fluid in his body in order to decrease the size of the heart, diminish the congestion in the lungs and diminish the extent of the peripheral edema that plaintiff has in his legs. This treatment, accompanied by a low sodium diet and the loss of 25 or 30 pounds and with the taking of digitalis to reduce the heart rate and to give a greater efficiency of cardiac contraction, along with diuretics, would improve the plaintiff considerably. He might then be able to work as a watchman, although not to go back as a seaman. The minimum time of such treatment would be six months. The doctor was not too definite about the cost, although there was some indication that this would involve two treatments a week at about $3.00, or perhaps a total of $100.00.

The Court of Appeals for this circuit has recently commented on a seaman's right to maintenance and cure as follows:

> "'[T]he vitality of a seaman's right to maintenance and cure has not diminished through the years.' Mitchell v. Trawler Racer, Inc., supra, at — [28 U. S. L. Week 4293, decided May 17, 1960]. It has become established that the obligation of the shipowner attaches as a result of the relationship of employing without any regard for the form of the contract or the will of the contracting parties. Cortes v. Baltimore Insular Line, 1932, 287 U. S. 367, 372. The rights of the seaman are neither conditioned on fault on the part of the [fol. 85] shipowner nor on the absence of fault on his part. Farrell v. United States, 1949, 336 U. S. 511. Nor must the injury or illness be in any way causally connected with shipboard duties. Farrell v. United States, supra. The obligation to provide maintenance and cure has been expanded so far that two of the foremost admiralty scholars have concluded that 'With

> the exception of borderline cases on misconduct * * * [t]he remedy has become absolute.' Gilmore and Black, The Law of Admiralty (1957) 261." Bartholomew v. Universe Tankships, Inc., 2 Cir., No. 25989, decided June 21, 1960.

Of course, this responsibility of the shipowner to provide maintenance and cure extends only until the point of maximum recovery. Calmar SS Corp. v. Taylor, 1938, 303 U. S. 525; Farrell v. United States, 1949, 336 U. S. 511.

As with other well-defined rules of law, difficulties arise in the application to a given factual situation. The problem present here stems from the fact that the plaintiff has two distinct physical disabilities.

As heretofore found, the heart condition pre-existed employment and did not manifest itself during the employment. The responsibility anciently imposed upon a shipowner for the health and security of sailors was liability for the maintenance and cure of seamen *becoming ill or injured* during the period of their service. See Aguilar v. Standard Oil Co., 1942, 318 U. S. 724, 730, including Note 6, p. 730.

Cases cited by the plaintiff are not applicable. They involve situations where a pre-existing condition either becomes aggravated or manifests itself during service on the vessel or are cases based upon a ship-incurred ailment. See Ahmed v. United States, 2 Cir., 1949, 177 F. 2d 898; United States v. Robinson, 5 Cir., 1949, 170 F. 2d 578; Hern [fol. 86] v. Moran Towing and Transportation Co., 2 Cir., 1943, 138 F. 2d 900; Rex v. Colonial Nav. Co., 2 Cir., 1941, 116 F. 2d 580; Lindgren v. Shepard S. S. Co., 2 Cir., 1940, 108 F. 2d 806.

In any event, I am convinced that the heart condition was incurable on March 1, 1955 when the plaintiff was discharged from the Marine Hospital. When meaningful hopes for recovery end, the shipowner's liability ends. If the disease is incurable the shipowner has no further liability even though the patient may require additional treatment to restrain degeneracy or relieve pain. Desmond v. United States, 2 Cir., 1954, 217 F. 2d 948.

I am impressed by the testimony of Dr. Eugene Clark, who examined the plaintiff on October 30, 1957 and on

April 27, 1960 and examined the records of the Marine Hospital. Dr. Clark found no indication of a congestive heart failure. The "compensation" treatment described by Dr. Spindler would not improve the essential heart condition of the plaintiff—the enlargement of the cardiac vessels.

The back condition of the plaintiff—the herniation of the nucleus pulposus—arose while plaintiff was in the service of defendant's vessel. The shipowner was obligated to furnish maintenance and cure until such time as the disease was cured or recognized as incurable. This duty does not extend beyond a fair time after the voyage in which to effect such improvement as the seaman's condition can reasonably may be expected to result from nursing care and medical treatment. Calmar SS Corp. v. Taylor, 1938, 303 U. S. 525, 530.

In this case, the aneurysm of the aorta due to arteriosclerosis made surgical intervention to cure the herniation of the nucleus pulposus impossible. When the plaintiff was released from the Marine Hospital on March 1, 1955 maximum hospital benefit was indicated. It is the contention [fol. 87] of the plaintiff that "conservative treatment should have been given which would have rehabilitated from to a point where he could have obtained sedentary employment. At issue, therefore, is the meaning of the word "cure."

In The Bunker No. 2, 2 Cir., 1917, 241 Fed. 831, 835, "cure" was defined as follows:

> "* * * We agree with the remarks in The Mars, supra (49 Fed. 729, 731 C.C.A. 435 (C.C.A. 3d)), that:
>
> "'The word "cure" is used in its original meaning of care, and means proper care of the injured seaman, and not a positive cure, which may be impossible.'
>
> "Furthermore, 'cure' has been held to signify:
>
> "'The ordinary medical assistance and treatment in case of injury or acute disease, for a reasonable time. The ship is not bound to pay for the sailor's medication for the cure of a chronic disorder for an indefinite length of time.' The Ella S. Thayer (D. C.) 40 Fed. 904.
>
> "Nor does the liability of the ship extend beyond—'expense of effecting a cure by ordinary medical means.

> This does not include extraordinary medical treatment or treatment after cure effected as completely as possible in a particular case.' The C. S. Holmes, supra [(D. C.) 209 Fed. 970]."

In *Carlsson* v. *United States*, 2 Cir., 1958, 252 F. 2d 352, the court noted that the right to maintenance and cure may continue to exist until maximum *rehabilitation* has been obtained. However, in *Buch* v. *United States*, 2 Cir., 1955, 220 F. 2d 165, an award based upon a rehabilitation program was reversed when the appellate court found insufficient evidence to demonstrate the curative nature of the treatment. The curative nature of the treatment was [fol. 88] also emphasized in *Bradt* v. *United States*, 2 Cir., 1955, 221 F. 2d 325.

Maximum cure is reached when no further improvement in the seamen's condition is to be expected. *Wilson* v. *United States*, 2 Cir., 1956, 229 F. 2d 277; *Kosluski* v. *United States*, 2 Cir., 1953, 208 F. 2d 957.

No further improvement in plaintiff's back condition could have resulted from any treatment after March 1, 1955. The treatment described by Dr. Mauer is not of a sufficiently curative nature to be classified as cure. Dr. Mauer's conservative treatment consists of the wearing of a brace, physiotherapy and vitamin B-12 injections. This treatment appears to be in the nature of an attempt to restrain degeneracy or relieve pain rather than curative. See *Desmond* v. *United States*, 2 Cir., 1954, 217 F. 2d 948.

In addition, Dr. Mauer examined the plaintiff on May 2, 1960. It is not unreasonable to assume that some of the conditions found on that date, namely the general weakness and the atrophy of the left thigh and left calf, were directly related to the five years spent in inactivity without medical care since March 1, 1955. There is no assurance that the so-called "conservative treatment," which in essence is exercise and the wearing of a brace, was indicated by his condition on March 1, 1955.

Dr. Balensweig, who examined the plaintiff on June 25, 1956 and who examined the hospital records at that time, was of the opinion that the plaintiff had reached maximum cure at the time of the discharge from the hospital.

There is no evidence here that subsequent to March 1, 1955 the plaintiff ever sought medical treatment or incurred medical expense. See *Carlsson* v. *United States*, 2 Cir., 1958, 252 F. 2d 352, 353. This is not to indicate that this failure to seek medical attention would warrant a forfeiture of his right to maintenance and cure. See *Gardner* v. *Sinclair Refining Co.*, 3 Cir., 1955, 227 F. 2d 958.

[fol. 89] But the failure of the plaintiff to seek such relatively simple treatment for over five years raises doubt as to the validity of the proposed cure. See *Buck* v. *United States*, 2 Cir., 1955, 220 F. 2d 165, wherein the court stated: "Since the libelant has shown no inclination to date to undertake this program, we cannot say that its curative nature was sufficiently demonstrated" (p. 166).

The Plaintiff reached maximum cure on March 1, 1955 when all meaningful hopes for recovery ended and no further improvement in his condition could be expected. He is entitled to maintenance from December 15, 1954 to January 12, 1955 in the amount of $224, plus interest as hereinafter designated.

Conclusions of Law

1. This court has jurisdiction of the parties and of the subject matter of this action.

2. The defendant has the duty to provide maintenance and cure to any seaman injured or falling ill in the service of the ship.

3. The plaintiff suffered a back injury while in the service of the ship and also suffered from a cardio-vascular condition.

4. The plaintiff reached the point of maximum recovery for both disabilities on March 1, 1955, the date of his discharge from the United States Public Health Service Hospital at Stapleton, Staten Island, New York and no further improvement in his condition could be expected after that date.

[fol. 90] 5. The plaintiff is entitled to recover maintenance and cure at the rate of $8.00 per day from December

15, 1954, the date of the termination of the voyage of defendant's vessel, to January 12, 1955, the date of his admission to the United States Public Health Service Hospital, a total of 28 days, for a total amount of $224, plus interest on each day's allowance, such interest on each day's allowance to be computed for the period commencing on such day and running to the date of actual payment.

Let a decree be entered in accordance herewith in favor of the libellant for the sum of $224 with interest on each day's allowance, such interest on each day's allowance to be computed for the period commencing on such day and running to the date of actual payment.

Richard H. Levet, United States District Judge.

Dated: New York, N. Y.
June 29, 1960.

[fol. 106a]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 26716

ANDRES SAN MARTIN, Plaintiff-Appellant,

—against—

UNITED STATES LINES COMPANY, Defendant-Appellee and Third-Party Plaintiff,

—against—

UNITED STATES OF AMERICA, Third-Party Defendant.

STIPULATION AND ORDER SUBSTITUTING PARTY APPELLANT

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto:

1. That the Public Administrator of the County of New York, Thomas I. Fitzgerald, be substituted as party plaintiff-appellant in place of Andres San Martin, now deceased.

2. That the caption herein hereafter be as follows:

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MALTIN, deceased, Plaintiff-Appellant,

—against—

UNITED STATES LINES COMPANY, Defendant-Appellee and Third Party Plaintiff,

—against—

UNITED STATES OF AMERICA, Third Party Defendant.

[fol. 106b]

3. That Benjamin Glickman appears herein as attorney for the substituted party plaintiff-appellant, and Jacob Rassner appears herein as counsel for the substituted party plaintiff-appellant.

4. That the time to file the printed brief and appendix on behalf of the plaintiff-appellant be extended to November 15, 1961, and the plaintiff-appellant agrees not to file said brief and appendix before November 10, 1961.

Dated: New York, N. Y.
October 6, 1961.

Thomas I. Fitzgerald, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of Andres San Martin, deceased.

Benjamin Glickman, Attorney for Plaintiff-Appellant.

Jacob Rassner, Of Counsel for Plaintiff-Appellant.

Kirlin, Campbell & Keating, Attorneys for Defendant-Appellee.

So Ordered:

October 10, 1961.

Charles E. Clark, U.S.C.J.

[fol. 107]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 194—September Term, 1961

Docket No. 26716

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MARTIN, Deceased, Plaintiff-Appellant,

—v.—

UNITED STATES LINES COMPANY, Defendant.

OPINION—June 29, 1962

Before: Lumbard, Chief Judge, Clark, Waterman, Friendly, Smith, Kaufman, Hays and Marshall, Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Richard H. Levet, Judge, in a seaman's action for damages under the Jones Act and for maintenance and cure, dismissing the Jones Act claim on the basis of a special verdict negating negligence and unseaworthiness, and awarding $224 for maintenance and cure. Affirmed.

[fol. 108] Theodore H. Friedman (Benjamin Glickman, Jacob Rassner), New York, New York, for Plaintiff-Appellant.

Matthew L. Danahar (Kirlin, Campbell & Keating), New York, New York (John A. Dowd of Counsel), for Defendant.

FRIENDLY, Circuit Judge:

This action against United States Lines Company, begun in the Southern District of New York by Andres San Martin, a seaman employed on defendant's vessel, the SS. American Reporter, has been continued, on his death after trial, by the Public Administrator of New York County. The complaint, filed in 1955 and brought to trial in 1960, alleged two causes of action. The first, relying specifically upon the Jones Act, 46 U. S. C. 688, asserted that by reason of the unseaworthiness of the American Reporter and defendant's negligence, plaintiff had been caused to twist and strain his back while assigned to carry barrels of cement up the ship's gangway on November 6, 1954, and that defendant was further negligent "in failing to provide the plaintiff with timely, adequate, proper and competent medical care and attention and maintenance and cure, thereby aggravating his condition," with total damages of $75,000. The second was for maintenance and cure in the sum of $10,000.

Plaintiff's citizenship was not alleged. Defendant was alleged to be, in paragraph First, "a domestic corporation organized and existing under and by virtue of the Laws of the State of New York" and, in paragraph Second, "a foreign corporation duly licensed to do business within the State of New York." Paragraph Third alleged that "the defendant had an office for the transaction of business in [fol. 109] the Borough of Manhattan, City and State of New York." Compliance with F. R. Civ. Proc. 8(a)(1), demanding "a short and plain statement of the grounds upon which the court's jurisdiction depends," was evidently intended to be met by paragraph Ninth: "Plaintiff elects to maintain this action under the provisions of Section 33 of the Merchant Seamen's Act as of June 15, 1920, C. 250 41

Stat. 1007 otherwise known as the Jones Act." There was endorsed on the complaint "Plaintiff Demands a Jury Trial." In its answer defendant denied being a New York corporation and admitted being a foreign corporation and having a New York office.

Before a jury was chosen, Judge Levet directed that the claim for maintenance and cure be tried to the court only; counsel for plaintiff excepted. On the following morning, discussion of this was resumed in the robing room before the taking of testimony began. Plaintiff's counsel stated that jury trial of maintenance and cure "is a matter of choice for the District Court," and also that "The plaintiff is entitled to a jury on this action which is properly before this Court on a common-law basis"—without further amplification save for reference to "the authority of Jenkins v. Walker" [presumably *Jenkins* v. *Roderick*, 156 F. Supp. 299 (D. Mass. 1957)], and "the discussion of that case by the Supreme Court in Romero v. International Terminal." The judge adhered to his ruling "that in this court, in the Second Circuit, it is permissible and authorized to try maintenance and cure to the Court."

At the conclusion of the trial Judge Levet submitted to the jury six questions, relating respectively to negligence, unseaworthiness, resulting injury, amount of damages, contributory negligence, and its degree. The jury gave negative answers to the first two questions; consequently, in accordance with the judge's direction, it did not answer the last four. Appellant makes no complaint as to the form [fol. 110] of the questions or the judge's charge; he does complain about certain rulings excluding evidence, which we will consider below.

In an opinion later filed, the judge found that San Martin had incurred a back injury while in the service of the ship and also suffered from a cardio-vascular condition due in part to untreated syphilis; that he had reached the point of maximum recovery for both disabilities on March 1, 1955, when he was discharged from a United States Public Health Service Hospital; and that liability for maintenance and cure was thus limited to the period, 28 days, before he entered the hospital, to wit, $224. Although appellant criticizes the judge's determination with respect to main-

tenance and cure, his principal complaint on that aspect of the case is that the judge should not have made any determination but ought to have left the issue to the jury; as to the criticisms apart from this principal complaint, it suffices to say that the judge's determination was not in any view clearly erroneous.

Because the analysis of the right to jury trial of the claim for maintenance and cure made by a majority of the panel conflicted with a recent dictum on the subject by this Court, see Mr. Justice Frankfurter in *Western Pacific Railroad* case, 345 U. S. 247, 270 (1953), and also because the problem constantly recurs in the district courts, we determined that the case should be considered *in banc*, upon the briefs and argument already had. This consideration has produced a variety of views, with none commanding a majority. It will thus be convenient to dispose of the issues relating to the trial of the personal injury claim, which none of us would have thought appropriate for *in banc* consideration if standing alone, before proceeding to the question of jury trial of the claim for maintenance and cure.

[fol. 111]

I.

Certain of appellant's objections to rulings excluding evidence on his personal injury claim, relating to San Martin's explanation of his failure to make earlier complaint about his injury, his colloquy with physicians at the Public Health Service clinics and hospital, and a report by a physician who testified for him, are rendered moot by the special verdict negating unseaworthiness or negligence; we need concern ourselves only with the exclusion of evidence relating to the accident itself.

Appellant complaint that San Martin was not allowed, on direct examination, to testify that he had objected to carrying the two heavy barrels of cement up the gangway. Although we can see no sufficient reason for this ruling, it was not prejudicial since counsel returned to the subject on redirect and, without objection, elicited testimony that San Martin had told his boss, Manzo, the mission was "too dangerous" and the boss had answered "You have to do

anyway. Appellant next urges that San Martin was not allowed to testify why he moved from side to side while ascending the gangway. Again the ruling seems needlessly severe but not, as matters developed, prejudicial. The evident purpose of the testimony was to show the gangway was unstable. San Martin was allowed to testify that he moved and that the gangway moved; the physical layout of the gangway was in evidence; and the judge stated in his charge, without exception from plaintiff's counsel, "As appears by the stipulation read to you this morning, it is agreed that the nature and position of the gangway does not enter into the disposition of this case."

Finally, and most important, appellant objects that one of San Martin's fellow-employees, Murrell, was not allowed to answer a question as to conversations with Manzo about bringing aboard engine stores within a month before the [fol. 112] accident, even after it had been shown that the weights of the stores on the prior occasion were less than the 100 pounds San Martin was ordered to carry on the day of the alleged injury. When the judge inquired as to the pertinency of this testimony, counsel answered, not very informatively, "Prior and similar loading procedure," to which the court responded "It is too remote." Assuming in appellant's favor, perhaps somewhat generously, that counsel's remark was an offer to prove that Murrell had complained to Manzo about the manual loading of lesser weights, the evidence should have been admitted. Knowledge of danger is relevant to a determination of negligence, the *Nitro-Glycerin* case, 82 U. S. (15 Wall.) 524, 536-537 (1873), and evidence that such knowledge was gained through an express communication is admissible. 2 Wigmore, Evidence (3d ed. 1940) §245; *New York Life Ins. Co.* v. *Seighman*, 140 F. 2d 930, 932-933 (6 Cir. 1944); *Evans* v. *Pennsylvania R.R.*, 255 F. 2d 205, 209-210 (3 Cir. 1958); *Smith* v. *Whittier*, 95 Cal. 279, 30 Pac. 529 (1892); *Jenkins* v. *Reichert*, 125 Conn. 258, 5 A. 2d 6 (1939); *Dowling* v. *L. H. Shattuck, Inc.*, 91 N. H. 234, 17 A. 2d 529 (1941); *Killian* v. *Andrews Mfg. Co.*, 187 N. C. 810, 123 S. E. 86 (1924). However, the probative effect of the excluded evidence would not have been great. The case differs significantly from those cited where the dangers were defects

in machinery or property, things which the defendant might not notice on his own inspection and, in many instances, so technical that he might not appreciate the danger if he did; in such cases proof of notice is highly critical since there may be no basis for finding the defendant negligent without it. Here the issue related to the safety of the carrying of certain weights by men rather than machines. The jury had the evidence of experts called by both parties, San Martin's own testimony he had told Manzo the procedure was "too dangerous," and its own common sense; if [fol. 113] the jury was not persuaded of negligence on that evidence, it hardly would have been by the addition of testimony that a fellow employee had complained about the procedure on a previous occasion. In *Dowling* v. *L. H. Shattuck, Inc.*, *supra*, where the evidence of a prior communication, held properly admitted, was far more important, the court implied that the trial judge would also have been upheld if he had excluded it. In view of this and the recognized discretion of trial judges to exclude for remoteness, see, e.g., *Duvall* v. *Birden*, 124 Conn. 43, 198 Atl. 255 (1938); *Hutteball* v. *Montgomery*, 187 Wash. 516, 60 P. 2d 679 (1936), reversal with respect to the personal injury claim is not called for, even though a more liberal concept of relevancy would have conformed better with modern trends in the law of evidence.

II.

We can also unanimously dispose of one argument of appellant with respect to the denial of jury trial, namely, that the judge erroneously reserved for himself plaintiff's claim for damages from negligent failure to furnish care or maintenance and cure. Appellee does not dispute that such a claim is conferred by the Jones Act, with the attendant right to trial by jury, *Cortes* v. *Baltimore Insular Line, Inc.*, 287 U. S. 367 (1932); *Vaughan* v. *Atkinson*, —— U. S. —— (1962). However, although the complaint alleged such a claim, no evidence was adduced to support it, and plaintiff's counsel made no request that any question on this subject be included in those propounded to the jury. We cannot assume the judge would have refused to submit such a question if the evidence had warranted.

III.

Appellant's contention that San Martin was entitled to a jury trial on his claim for maintenance and cure rests on [fol. 114] two alternative grounds: (1) that San Martin had invoked the court's diversity of citizenship jurisdiction, 28 U. S. C. §1332; and (2) that he was entitled to a jury trial irrespective of this because his claim for maintenance and cure was "pendent" to his claim under the Jones Act. This section of the opinion deals with the first ground.

There are many statements by commentators that a seaman properly invoking the jurisdiction of the district court because of diverse citizenship has a right to a jury trial of a claim for maintenance and cure, whether this is asserted independently or joined with other claims. See, e.g., Benedict, American Admiralty (1st ed. 1850 & 2d ed. 1870), p. 107; 1 *id.* (6th ed. 1940), p. 36; 5 Moore, Federal Practice (1951), p. 284; 71 Harv. L. Rev. 1359, 1360 (1958); Currie, The Silver Oar and All That: A Study of the Romero Case, 27 U. Chi. L. Rev. 1, 5 (1959); The Supreme Court, 1958 Term, 73 Harv. L. Rev. 126, 139 (1959). The reasoning stems from §9 of the Judiciary Act of 1789, 1 Stat. 77, carried forward into 28 U. S. C. §1333(1), wherein the grant to the district courts of "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" was qualified with the famous reservation, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." The common law is competent to give a common law remedy for breach of the obligation, created by the general maritime law, to pay maintenance and cure, namely, a money judgment against the operator of the ship. The saving clause thus permits a suit to that end in a state court, where jury trial may usually be had, see *Leon* v. *Galceran*, 78 U. S. (11 Wall.) 185 (1871); *Norton* v. *Switzer*, 93 U. S. 355, 356 (1876); *Garrett* v. [fol. 115] *Moore-McCormack Co., Inc.*, 317 U. S. 239 (1942). Hence, it is reasoned, if such a suit were removed to the

[1] Subject, however, to a *caveat*, "Congress *probably* intended that if he sued in the federal court (as he might if there were diversity of citizenship) he should have the right to a jury trial." [Emphasis supplied.] Perhaps the "*probably*" was due to the considerations outlined in fn. 6.

Federal court because of diversity or brought there on that ground, the saving clause requires jury trial.

In view of the plausibility of the argument and the unanimity of the commentators, it is surprising that the first case we have found that specifically decided in favor of a jury trial in a Federal diversity suit on a maritime claim (in that case personal injury caused by unseaworthiness) is *Philadelphia & Reading R. Co.* v. *Berg*, 274 F. 534, 539 (3 Cir. 1921), affirming 266 F. 591 (E. D. Pa. 1920), cert. denied, 257 U. S. 638 (1921). The Court of Appeals noted that "The Supreme Court of the United States has not passed upon this specific question, but the right to try on the law site [sic] of the District Court a cause arising in admiralty has been recognized in the Circuit Court of Appeals for the Second Circuit," citing *John A. Roebling's Sons Co.* v. *Erickson*, 261 F. 986 (2 Cir. 1919), cert. denied, 252 U. S. 585 (1920); *Hanrahan* v. *Pacific Transport Co.*, 262 F. 951 (2 Cir. 1919), cert. denied, 252 U. S. 579 (1920), and *Storgård* v. *France & Canada S.S. Corp.*, 263 F. 545 (2 Cir.), cert. denied, 252 U. S. 585 (1920). Examination of the papers on appeal in those suits, all for accidents antedating the Jones Act, shows that diversity did exist and maritime claims (unseaworthiness in all three cases and also maintenance and cure in the first) were submitted to the jury; however, such submission was not disputed, and the point is not discussed.[3] Since the *Berg* case a considerable number of opinions have recognized, either by dictum or by decision, the right to jury trial of a claim [fol. 116] for maintenance and cure and other maritime claims of seamen filed on the "law side" of the Federal court on the ground of diversity: *Thornes* v. *Socony Vacuum Oil Co.*, 38 F. Supp. 616 (S. D. N. Y. 1940); *McDonald* v. *Cape Cod Trawling Corp.*, 71 F. Supp. 888, 890 (D. Mass. 1947) [dictum]; *Jordine* v. *Walling*, 185 F. 2d 662, 671 (3 Cir. 1950) [dictum]; *Watlack* v. *North Atlantic*

[2] The accident quite clearly antedated the Jones Act, which became effective June 5, 1920. 41 Stat. 1007.

[3] The Third Circuit's citation of the Second Circuit cases was likely due to the fact that plaintiff's counsel in all four cases was the late Silas B. Axtell.

& Gulf SS. Co., Inc., 107 F. Supp. 162 (E. D. Pa. 1952), aff'd, 202 F. 2d 280 (3 Cir. 1953); *Williams* v. *Tide Water Associated Oil Co.*, 227 F. 2d 791 (9 Cir. 1955), cert. denied, 350 U. S. 960 (1956); *Troupe* v. *Chicago, D. and G. Bay Transit Co.*, 234 F. 2d 253, 258 (2 Cir. 1956); *Morrow* v. *Point Towing Co.*, 187 F. Supp. 168 (W. D. Pa. 1960).[4] See also *McAfoos* v. *Canadian Pacific Steamships, Ltd.*, 243 F. 2d 270, 274 (2 Cir.), cert. denied, 355 U. S. 823 (1957); *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437, 451 (2 Cir.) (concurring opinion), cert. denied, 359 U. S. 1000 (1959). In any event, despite a dubious "archeological" argument, see *Romero* v. *International Terminal Operating Co., Inc.*, 358 U. S. 354, 370 (1959), that might have been made from other language in the Act [fol. 117] 1789, an argument which, as a matter of possible interest to historians, we state and refute in the margin,[5]

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[4] Some of the cases suggest that to entitle a diversity plaintiff to a jury trial of a maritime claim joined with a claim at law, the maritime claim alone must satisfy the jurisdictional amount, see *Morrow* v. *Point Towing Co.*, 187 F. Supp. at 169. Normally aggregation for this purpose of claims properly joined is allowed, see 3 Moore, Federal Practice (2d ed. 1948), p. 1815 and cases cited note 5, also 1961 supplement pp. 160-161 and cases cited note 5.

[5] It may also be said with much force that statements by the Supreme Court that where diversity exists, a plaintiff may have an action "at law" in the Federal courts to enforce a maritime claim, see *The Belfast*, 74 U. S. (7 Wall.) 624, 643 (1869); *Leon* v. *Galceran*, 78 U. S. (11 Wall.) 188; *Steamboat Company* v. *Chase*, 83 U. S. (16 Wall.) 522, 533 (1873); *Norton* v. *Switzer*, 93 U. S. at 356; and *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 362 (1959); implicitly included that characteristic feature of an action at law, namely, a jury trial, even though no specific reference to that was made. See also *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 628 (1959).

[6] Section 9 of the First Judiciary Act, which gave the district courts, *inter alia*, "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction," subject to the saving clause, provided that "the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury." Since the admiralty and maritime jurisdiction of the district courts under §9 extended only to "traditional" admiralty causes, such as proceedings *in rem* and suits *in personam* where the complaining party chose to call himself a

However, recognition of this rule does not call for reversal here. When the issue of jury trial arose, the judge had nothing before him save the pleadings. The complaint, [fol. 119] on which the jury demand was endorsed, gave no the point has now been placed beyond all doubt by lan [fol. 118] guage in a recent Supreme Court decision, *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, —— U. S. —— (1962).

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libelant rather than a plaintiff. *Leon* v. *Galceran*, 78 U. S. (11 Wall.) at 188; Mr. Justice Brennan dissenting in *Romero* v. *International Terminal Operating Co.*, 358 U. S. at 396, the last quoted provision in §9 would not itself weigh against the view that jury trial could be had in a suit on the "law side" where diversity existed. However, §12 of the Act of 1789 provided that in the circuit courts, in which diversity jurisdiction had been lodged, "the trial of issues in fact * * * shall, on all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury," and §19 made it "the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record either from the pleadings and decree itself, or a statement of the case agreed by the parties, or their counsel, or if they disagree by a stating of the case by the court." Since the only suits of admiralty and maritime jurisdiction that could be brought on for initial trial in the circuit courts seem to have been those under the saving clause, notably cases of diverse citizenship, either originally, §11, or on removal, §12, it could be argued that the language of §12 excluding jury trial of issues of fact in admiralty and maritime matters, and of §19 requiring the court to find the facts in such cases, would have had no purpose unless it covered suits under the saving clause where the source of the right lay in general maritime law.

The answer, perhaps not a wholly satisfactory one, is that the language of §§12 and 19 of the Act of 1789 as to admiralty and maritime matters related rather to appeals to the circuit courts "from final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars," authorized by §21, wherein, in accordance with traditional admiralty practice, evidence could be taken, see, e.g., *Yeaton* v. *United States*, 9 U. S. (5 Cranch) 281 (1809); *The Lucille*, 86 U. S. (19 Wall.) 73 (1874); *The Charles Morgan*, 115 U. S. 69 (1885); *Irvine* v. *The Hesper*, 122 U. S. 256 (1887). This view gains some support from §1 of the Act of February 16, 1875, 18 Stat. 315, which provided "That the circuit courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance-side of the court, shall

indication of reliance on diversity; the pleader was so little concerned with that subject that he made no allegation of plaintiff's citizenship and alleged that defendant both was and wasn't a citizen of New York, although with an office there. No one called the judge's attention to the answer's disclaimer of defendant's New York citizenship—along with an admission of a New York office, which under the law

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find the facts and the conclusions of law upon which it renders its judgment or decrees, and shall state the facts and conclusions of law separately"—substantially as stated in §19 of the Act of 1789—and then went on "And in finding the facts, as before provided, said court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue * * * impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such cause, under the direction of the court, as in cases at common law. And the finding of such jury, unless set aside for lawful cause, shall be entered of record, and stand as the finding of the court, upon which judgment shall be entered according to law." See *The Abbotsford*, 98 U. S. 440 (1879). Benedict, American Admiralty (3d ed. 1900), p. 104, says that this statute was intended to deal with appeals to the circuit court but that the author had never heard of a case where a jury had been used. See also notes to 28 U. S. C. §771 (1940 ed.) and *Munson SS. Line* v. *Miramar SS. Co.*, 167 F. 960 (2 Cir.), cert. denied, 214 U. S. 526 (1909).

In addition to this explanation, it seems most unlikely that, with the enthusiasm of the founders for jury trial and their adoption of Coke's "enmity" of admiralty jurisdiction (see Buller, *J.*, in *Smart* v. *Wolff*, 3 T. R. 323, 348, 100 Eng. Regp. 600, 613 (1789); 1 Holdsworth, History of English Law (3 ed. 1922), pp. 556-557; the resolution of the Massachusetts legislature quoted in 1 Holdsworth at p. 558 fn. 2; and the concurring opinion of Mr. Justice Johnson in *Ramsay* v. *Allegre*, 25 U. S. (12 Wheat.) 611, 614 (1827)), the framers of the First Judiciary Act could have meant to permit an out-state defendant sued by an in-state plaintiff on a maritime claim in a state court to prevent, by removal to the circuit court, a jury trial the plaintiff could otherwise have had, or to deprive the in-state defendant sued by the out-state plaintiff in the circuit court of such a trial.

The provisions of the First Judiciary Act here discussed remained in the statute book, save as modified by 5 Stat. 726 (1845), now 28 U. S. C. §1873, with respect to shipping upon the Great Lakes, until 1948, see Rev. Stat. §§566 and 648; Act of March 3, 1875, §3, Stat. 471; Judicial Code of 1911, §291, 36 Stat. 1167; 28 U. S. C. §770 (1940 ed.). The repeal was on the explicit ground that the subject was "covered by rule 38 of the Federal Rules of Civil Procedure," see Reviser's Note to 28 U. S. C. §1873.

applicable to suits brought after July 25, 1958, might well have negated diversity if plaintiff were a New York citizen. 28 U. S. C. 1332(c). Neither the judge nor, so far as we can see, anyone else then had any idea that Federal jurisdiction was being invoked on any basis other than the Jones Act, or that jury trial of the claim for maintenance and cure was being claimed on any basis other than "pendency" to it —"pendency" was the point of the authorities cited. Counsel's single reference to a "common-law basis" was quite insufficient to apprise the judge of a theory of diversity nowhere disclosed.

Later, in the course of testifying on the merits, San Martin said he had been born in Spain in 1897, had come to the United States in 1915, had joined the American Reporter in New York in 1953, and had lived in New York since his discharge from the Public Health Hospital in 1955. This, appellant says, shows that San Martin was a citizen either of Spain or of New York, so that diversity in fact existed. This was enough so that if the judge had altered his prior ruling and sent the maintenance and cure claim to the jury, we would affirm, since submission to the jury would have been proper on the facts as they later appeared, and we would conform the pleading to the proof. *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 234 F. 2d 253, 257-258 (2 Cir. 1956); see *Brooks* v. *Yawkey*, 200 F. 2d 663, 664 (1 Cir. 1953). However, counsel did not suggest [fol. 120] to the judge that San Martin's statements, made in the course of testifying generally, called for reconsideration of his earlier rulings as to jury trial. We cannot properly direct a busy District Court to retry San Martin's claim for maintenance and cure before a jury, after a fair trial before a judge, on a ground for jury trial not disclosed in the complaint and never brought to the judge's attention after it appeared.

IV.

We thus come to appellant's alternative contention that, even if diversity was not sufficiently made out to render the denial of a jury trial of the claim for maintenance and cure erroneous on that score, San Martin was entitled to such a

trial of that claim on the basis of "pendent jurisdiction." In contrast to the argument based on diversity, this contention was raised below with sufficient clarity to require us to consider a question the Supreme Court left open in *Romero*, 358 U. S. at 381, namely, whether in a non-diversity case where a substantial claim has been asserted under the Jones Act, the District Court may and, if so, ought submit to the jury for final determination a claim for maintenance and cure which has been joined with it. On this we are divided. Chief Judge Lumbard, Judges Moore and Kaufman and I, for whom the balance of this opinion speaks, answer the first half of the question in the negative and do not reach the second; Judges Waterman and Smith, concurring for affirmance, differ with us in holding that in such a case the judge has discretion so to submit to the jury a claim for maintenance and cure arising out of the same event as the Jones Act claim; Judges Clark, Hays and Marshall believe jury trial of the joined claim for maintenance and cure was here required.

[fol. 121] (1) By explicit statutory direction an action under the Jones Act is "an action for damages at law with the right of trial by jury," 46 U. S. C. §688. As "an action * * * at law," it is governed by the Federal Rules of Civil Procedure, F. R. Civ. Proc. 1, despite the inapplicability of those rules "to proceedings in admiralty," F. R. Civ. Proc. 81(a)(1). A claim for maintenance and cure may properly be joined in such an action under the broad language of F. R. Civ. Proc. 18(a). We say this even though the claim is founded on the maritime law and the rule refers to the joinder of "claims either legal or equitable or both," words which we read as inserted, *ex majore cautela*, to prevent future judicial adherence to traditional distinctions against the joinder of legal and equitable claims, not to prohibit the joinder of claims under maritime law which the courts already permitted.[7]

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[7] See *Stevens* v. *R. O'Brien & Co.*, 62 F. 2d 632, 633 (1 Cir. 1933). Such joinder continued to be upheld in the First Circuit after adoption of the Federal Rules, *Nolan* v. *General Seafoods Corp.*, 112 F. 2d 515, 517 (1940); *Bay State Dredging & Contracting Co.* v. *Porter*, 153 F. 2d 827 (1946), both antedating the First Circuit's position, *Jansson* v. *Swedish American Line*, 185

The mode of trial in actions governed by the Rules is dealt with clearly and comprehensively in F. R. Civ. Proc. 38 and 39. These rules set up a basic division between issues as to which the right of jury trial is "declared by the Seventh Amendment * * * or * * * given by a statute [fol. 122] of the United States," and others. As to the former the right "shall be preserved to the parties inviolate." F. R. Civ. Proc. 38(a), subject only to timely demand. F. R. Civ. Proc. 38(b); even when timely demand has not been made, the court may in its discretion "upon motion" order a jury trial of such issues. F. R. Civ. Proc. 39(b). However, under the plain language of the Rules, that is the limit of the court's freedom. If the issue is not one triable to a jury as of right, the court is limited to an advisory jury, unless both parties consent to "a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right." F. R. Civ. Proc. 39(c). This meshes with the direction in Rule 52(a) that in non-jury matters "the court shall find the facts specially and state separately its conclusions of law thereon," a meshing made all the plainer by the 1946 amendment explicitly making Rule 52(a) applicable when there has been an advisory jury. When a complaint joins claims differing in character, each is to be given the mode of trial appropriate to its nature. *Dairy Queen, Inc.* v. *Wood*, — U. S. — (1962); *Ring* v. *Spina*, 166 F. 2d 546, 550 (2 Cir.), cert. denied, 335 U. S. 813 (1948); *Orenstein* v. *United States*, 191 F. 2d 184 (1 Cir. 1951); *Tanimura* v. *United States*, 195 F. 2d 329 (9 Cir. 1952); *Leimer* v. *Woods*, 196 F. 2d 828 (8 Cir. 1952); *Schaefer* v. *Gunzburg*, 246 F. 2d 11 (9 Cir.), cert. denied.

F. 2d 212, 217-218 (1950) and *Doucette* v. *Vincent*, 194 F. 2d 834, 836 (1952), with respect to the effect of 28 U. S. C. §1331 overruled in the *Romero* case. Footnote 5 to Chief Judge Magruder's opinion in the *Doucette* case states that diversity was not alleged in any of these three cases and that in *Nolan* the claim for maintenance and cure was for less than $3,000. 194 F. 2d at 840 fn. 5.

Joinder has also been upheld in the Third Circuit, *Lindquist* v. *Dilkes*, 187 F. 2d 21, 25 (1942), and in the Seventh, *Mallen* v. *Fitz Simons & Connell Dredge & Dock Co.*, 172 F. 2d 601, 604 (1948). In this Circuit claims for maintenance and cure have long been joined with Jones Act claims, apparently as here without objection, even when there was no diversity.

355 U. S. 831 (1957); *Chappell & Co.* v. *Palermo Cafe Co.*, 249 F. 2d 77 (1 Cir. 1957), although a prior jury verdict on a "legal" issue may conclusively determine an "equitable" one, *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959).

The sharp distinction made between the court's discretion to order an ordinary jury trial on an issue where this might have been but was not demanded, Rule 39(b), and the limitations imposed upon the court, Rule 39(c), with respect [fol. 123] to issues "not triable of right," forbids a construction permitting a judge to order "a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right" on an issue where no right to such a trial exists, merely because he might deem this convenient. Nothing to the contrary is indicated by decisions that an appellate court will not always reverse because of erroneous grant of a jury trial, *Hurwitz* v. *Hurwitz*, 136 F. 2d 796, 799 (D. C. Cir. 1943); cf. *Cargill, Incorporated* v. *Commodity Credit Corporation*, 275 F. 2d 745 (2 Cir. 1960), as it would be obliged to do for erroneous denial of one; the question is how to obey the Rules, not the consequence of disobeying them. We must confess that we can now see no sufficient reason why the Rules should be so rigidly drawn; we should think it desirable for a judge to have discretion to send to "a jury whose verdict has the same effect as if trial by jury had been a matter of right" all or part of equitable or maritime claims closely related to other claims on which jury trial is being had as of right, without as well as with "the consent of both parties,"* and would hope that

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* Perhaps the Committee justifiably thought it had done pretty well in accomplishing the merger of law and equity and did not wish to risk further ire from the proponents of equity by what might then have seemed a rather drastic proposal to give the judge discretion to order ordinary jury trial of an equitable claim.

* For example, a judge confronted with a maintenance and cure claim in a case such as this might like to have the jury determine, finally, rather than on a merely advisory basis, whether plaintiff's ailment arose while in the service of the ship, since the jury would have to consider this on the personal injury claim, but reserve for himself the purely medical issue, when maximum cure was effected if the verdict entitled the plaintiff to some award.

those now engaged in revising the Rules would consider such a change. However, the language of the Rules is too clear for any such reading, and we are therefore obliged to reject the unexplained *per curiam* dictum of a divided court *in banc*, *Reardon* v. *California Tanker Company*, 260 F. 2d [fol. 124] 369, 376 (2 Cir. 1958), cert. denied, 359 U. S. 926 (1959), that the mode of trial of a claim for maintenance, cure and wages joined with a claim for personal injury under the Jones Act rests in the discretion of the trial court, and address ourselves to the issue whether San Martin was given the right to jury trial of that claim "by the Seventh Amendment to the Constitution or * * * a statute of the United States." F. R. Civ. Proc. 38(a).

(2) Appellant does not contend that jury trial of a claim for maintenance and cure is "declared by the Seventh Amendment." The guarantee of jury trial in that amendment is limited to "suits at common law," the "common law" being, in Mr. Justice Story's words, "the common law of England, the grand reservoir of all our jurisprudence." *United States* v. *Wonson*, 28 Fed. Cas. 745, 750 (C. C. D. Mass. 1812). The amendment is "limited to rights and remedies peculiarly legal in their nature." *Shields* v. *Thomas*, 59 U. S. (18 How.) 253, 262 (1856); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48 (1937). "By common law, they [the framers] meant what the constitution denominated in the third article 'law': not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and maritime law and equity, was often found in the same suit." *Parsons* v. *Bedford*, 28 U. S. (3 Peters) 433, 446-447 (1830). Since longshoremen's claims "are governed by the maritime law as established by the Congress and are within the admiralty jurisdiction, the objection * * * as to the right of trial by jury under the Seventh Amendment is unavailing." *Crowell* v. *Benson*, 285 U. S. 22, 45 (1932); the same must be true as to seamen's [fol. 125] "Even in saving clause cases * * * where the

plaintiff seeks a remedy which the common law is competent to give, there is not a *constitutional* right to jury trial; Congress could repeal the saving clause and make the federal admiralty remedy exclusive, with the clear result that there would be no right to jury trial in maritime cases." Currie, *supra*, at 5.

(3) In the light of the *Romero* decision, ruling out 28 U. S. C. §1331 as a statute of the United States which might afford a right of jury trial on a claim for maintenance and cure, the only statutes of the United States requiring consideration are the Jones Act and the saving clause.

(a) The Jones Act provides that "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *" We held in *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437 (2 Cir.), cert. denied 359 U. S. 1000 (1959), that when a seaman suing for personal injury under the Jones Act predicated his action both on unseaworthiness and on negligence, both claims must be submitted to the jury. Judge Medina, writing for Judge Clark and himself, based this decision, 263 F. 2d 446, on "the fundamental singleness of the underlying claim, the fact that the Jones Act claim and the maritime claim of unseaworthiness," both claims in tort, generally predicated on the same facts and carrying the same measure of damages, "are so intertwined factually that they cannot as a matter of practice be separated into pieces." In that sense and in that only the unseaworthiness claim was described as "pendent," 263 F. 2d at 447. Judge Lumbard, [fol. 126] concurring, proposed a further ground, 263 F. 2d at 449-453, namely, "that the Jones Act, in permitting an action 'at law' for 'damages' for 'personal injury' to seamen, permitted them such an action based on the maritime doctrine of unseaworthiness as well as the legislative maritime doctrine of negligent operation." In a sense the result in the *Bartholomew* case followed rather inevitably from

the Supreme Court's decision in *Baltimore SS. Co.* v. *Philips*, 274 U. S. 316 (1927), that a judgment on a claim for personal injury based on unseaworthiness will bar assertion of a claim for the same injury based on negligence, and from *Pate* v. *Standard Dredging Co.*, 193 F. 2d 498, 502 (5 Cir. 1952), relied on by Judge Medina, 263 F. 2d 446 fn. 12, holding that a claim of unseaworthiness was not a "separate and independent claim or cause of action," so as to permit removal of a Jones Act claim under 28 U. S. C. 1441(c). Since the claim for maintenance and cure in the *Bartholomew* case had been tried to a judge in accordance with what had become the established practice in this circuit, nothing in the opinion was addressed to the mode of trial of such a claim.

It has long been recognized that the relationship of a claim for maintenance and cure to one for personal injury under the Jones Act is wholly different from the allegation of unseaworthiness in addition to negligence as a basis for the personal injury claim. The distinction was sharply drawn in *Pacific SS. Co.* v. *Peterson*, 278 U. S. 130 (1928), by the same bench that had decided the *Phillips* case eighteen months before. Receipt of maintenance and cure, the Court held, did not bar a subsequent action for personal injury under the Jones Act as a judgment in respect of unseaworthiness would. Mr. Justice Sanford disavowed, 278 U. S. 136, a previous expression of his in *Engel* v. *Davenport*, 217 U. S. 33, 36 (1926), which might be taken [fol. 127] "to mean that the right to recover compensatory damages under the new rule was granted as an alternative to the allowances covered by the old rules, including maintenance, cure and wages * * * *" The right given by the Jones Act "is not an alternative of the right under the old rule to 'maintenance, cure and wages'—which arises, quite independently of negligence, when the seaman falls sick or is injured in the service of the ship, and grows out of that which was termed in The Montezuma (C. C. A.), 19 F. 2d 355, 356, the 'personal indenture created by the relation of the seaman to his vessel,'" a right "implied in law as a contractual obligation arising out of the nature of the employment" and "independent of the right to indemnity or

compensatory damage for an injury caused by negligence," 278 U. S. 137-138.

It is not unnatural that, with this guidance, most Courts of Appeals took a radically different approach to the status of a claim for maintenance, cure and wages vis-a-vis a claim for personal injury under the Jones Act with which it had been joined, than with respect to the assertion of unseaworthiness in addition to negligence as a basis for recovery. The *Pate* decision, *supra*, assumed, 193 F. 2d 502, that a claim for maintenance and cure constituted a "separate and independent claim" under 28 U. S. C. §1441(c), which would have warranted removal in a case of diverse citizenship if jurisdictional amount existed. Somewhat earlier, dealing with the very question here presented, Judge Maris had written, for a unanimous court *in banc*, that it was error to send to a jury a claim for maintenance and cure joined with a claim for personal injury under the Jones Act, *Jordine* v. *Walling*, 185 F. 2d 662, 671 (3 Cir. 1950), a decision shortly followed in *Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, 191 F. 2d 82, 85-86 (7 Cir.), cert. denied, 342 U. S. 888 (1951). The [fol. 128] leading text thus correctly states, "By unquestionable authority a maintenance and cure claim is 'separate and independent' from both a Jones Act claim or an unseaworthiness claim for purposes of *res judicata* or §1441(c) or anything else." Gilmore and Black, Admiralty, p. 341. And we ourselves have recently said, in *Ryan* v. *United States Lines Company*, —— F. 2d ——, —— (2 Cir. 1962), that the claims are "totally different."

The differences exist both in the legal nature of the claims and in the practicalities of trial. The personal injury claim sounds in tort; the claim for maintenance, cure and wages "has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident," *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 371 (1932); see *Vaughan* v. *Atkinson*, —— U. S. —— (1962). The amount sought is likewise different; that involved in the claim for maintenance, cure and wages is usually a small fraction of that sued for in the personal injury claim. Even though the

incident contended to give rise to the personal injury claim is found never to have occurred, the seaman will still be entitled to maintenance, cure and wages if his condition arose in the service of the ship. The litigated points on the latter claim are simply whether the condition arose in the seaman's service and when maximum cure has been effected; this is usually a contest of medical experts, on issues the former of which may have little and the latter has no relation to the personal injury claim.

However, the practice in this Circuit until 1956 seems to have been to submit a claim for maintenance and cure to the jury along with a claim under the Jones Act, even though no diversity existed. The legal basis for this and the contrary authorities in other circuits were not discussed, although the practice was noted, without disapproval, in *McAllister* v. *Cosmopolitan Shipping Co.*, 169 F. [fol. 129] 2d 4 (1948), rev'd on other grounds, 337 U. S. 783 (1949); *Gonzales* v. *United Fruit Co.*, 193 F. 2d 479 (1951); and *Rosenquist* v. *Isthmian SS. Co.*, 205 F. 2d 486 (1953). *Weiss* v. *Central R. Co.*, 235 F. 2d 309 (1956), was the turning point. This Court's opinion, by Judge Clark, mentioned in a footnote that the judge had decided the maintenance and cure count, at the plaintiff's request and, apparently, without objection by the defendant—"Hence there is not involved the practice followed in this circuit of submitting the issue of maintenance and cure to the jury, along with the issue of negligence," citing the *Gonzales* case, *supra*. The footnote added "Obviously the simultaneous trial of the two claims—one to the judge sitting in admiralty and the other to the jury—is convenient and proper." This considered statement and its approving citation of *Jordine* v. *Walling* and *Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, *supra*, caused the district courts in this circuit generally to alter their practice so that, although unseaworthiness claims joined in Jones Act suits have regularly been submitted to the jury even though there be no diversity, claims for maintenance and cure in non-diversity cases have been reserved for trial by the judge. See, e.g., *Troupe* v. *Chicago, D. & G. B. Transit Co.*, 234 F. 2d 253, 256 (1956); *Bartholomew* v. *Universe Tank-*

ships, Inc., supra, cert. denied, 359 U. S. 1000 (1959); *Murray* v. *New York Central R. Co.*, 287 F. 2d 152, 153, cert. denied, 366 U. S. 945 (1961); *Salem* v. *United States Lines Co.*, 293 F. 2d 121, 124, rev'd on other grounds, —— U. S. —— (1962). Since the district judges were following the lead we had given them in *Weiss*, we naturally approved; and the later dictum as to discretion, in *Reardon*, appears to have had little or no practical effect.

(b) It is now urged that even though the claim for maintenance, cure and wages be not "pendent" to the personal [fol. 130] injury claim in the limited sense defined in *Bartholomew*, it is "pendent" in a more general sense which entitled the plaintiff to a jury trial under the "saving clause."[10] The Supreme Court pointed out in *Romero*, 358 U. S. 380-381, the anomaly of applying the "pendent jurisdiction" doctrine of *Hurn* v. *Oursler*, 289 U. S. 238 (1933)—that the assertion of a Federal claim permits a Federal court to decide a sufficiently related non-Federal claim otherwise outside its jurisdiction—to a claim for maintenance and cure which is always within Federal jurisdiction under 28 U. S. C. §1333(1), as, indeed, both Judge Medina and Judge Lumbard had done a few weeks earlier in *Bartholomew*, 263 F. 2d at 449, 455. Moreover, *Hurn* v. *Oursler* relates to the jurisdiction of a Federal court to decide a claim—not to the mode of trial; no one has ever supposed that joinder of a "state" equitable claim with a related "federal" legal claim under *Hurn* v. *Oursler* entitled the former to a jury trial. We see no reason for a different result when the joined claim is a Federal claim arising under the general maritime law.

We likewise see no force in an argument that if the door to the "law side" of the Federal court is unlocked by a claim under 28 U. S. C. §1331, here the Jones Act, the "saving clause" takes over and gives a right to jury trial on any claim for a money judgment properly joined, despite its

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[10] The change in language in the saving clause by the Judicial Code revision of 1948 is without significance—the Reviser's Note stating that the "substituted language" had been used as "simpler and more expressive of the original intent of Congress * * *" See Gilmore and Black, Admiralty (1956), 35.

maritime nature, just as if the door had been unlocked by diversity. 1332.] This overlooks what the saving clause was to save. The framers of the First Judiciary Act were [fol. 131] concerned with the many maritime claims for money judgments, which during the Revolution and under the Articles of Confederation had generally been tried in courts of the colonies or the states,[11] conveniently located to the suitors, and with jury trial. The prime purpose of the saving clause was to insure that such suits could continue to be brought and tried where and as they had been. *New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344, 390 (1848); *Romero* v. *International Terminal Operating Co.*, 358 U. S. 362. However, the grant of diversity jurisdiction allowed an out-state defendant sued by an in-state plaintiff on a maritime claim in a state court to remove such a suit to the circuit court, and a plaintiff of diverse citizenship to bring it there. In order to prevent this from altering the mode of trial, as well as to preserve for the diversity plaintiff suing in the circuit court the same mode of trial he would have had in the state court, there was developed the rule, noted in section III of this opinion, that when a maritime claim for a money judgment is heard in a Federal court because of diversity, the saving clause entitles the parties to the same jury trial they would normally have had in the state court. It was stated from an early date that the common law remedy preserved by the saving clause existed in the Federal courts only in diversity cases. *The Belfast*, 74 U. S. (7 Wall.) 624, 643 (1869); *Leon* v. *Galceran*, 78 U. S. (11 Wall.) 185, 188 (1871); *Steamboat Co.* v. *Chase*, 83 U. S. (16 Wall.) 522, 533 (1873), to which, broadly speaking, the circuit courts were limited until 1875, 18 Stat. 470.

[fol. 132] The saving clause considerations thus calling for a jury trial of a maritime claim in a diversity case are in no way pertinent to a non-diversity maritime claim joinable but not unitary with a statutory claim to which Con-

[11] Although some colonies and states created admiralty courts after 1776, the jurisdiction of most of these was limited to prize cases. See Putnam, How the Federal Courts Were Given Admiralty Jurisdiction, 10 Corn. L. Q. 460 (1925).

gress has accorded jury trial. Existence of a related Federal statutory claim does not expose the plaintiff suing in a state court under the saving clause to a risk of removal, as diversity does; he may protect himself, by limiting his state court action to his non-statutory claim.[12] Moreover, in the Jones Act, Congress specifically provided that the new statutory claim should not itself be removable, 28 U. S. C. §1445(a); hence even the joinder of such a claim with one for maintenance and cure does not give the defendant any right to remove the latter that he would not otherwise have had. Neither does the new statutory claim afford a non-diversity plaintiff a new opportunity to deprive the defendant of jury trial of the non-statutory claim by suing in the Federal court under §1331—the plaintiff could always have had non-jury trial of the maritime claim by suing in admiralty under §1333. Finally, whereas jury trial is needed to give the diversity plaintiff the same right in the Federal that he would have had in the state court, there is no similar basis for Federal solicitude with respect to the non-diverse plaintiff. Hence there is no reason why a claim for maintenance and cure should stand any differently with respect to jury trial in a Federal court after the Jones Act than before, unless the very existence of the new statutory claim demands this. A unanimous Supreme Court in 1928, far closer to the Jones Act than we, unmistakably considered [fol. 133] that the Act had left maintenance and cure exactly as this had always been, *Pacific SS. Co.* v. *Peterson*, *supra*; we would see no reason for a different view even if we had the power to take one. We conclude that since neither the Jones Act nor the saving clause gave plaintiff a right to jury trial of his claim for maintenance and cure, it would have been error, under Rules 38 and 39, to grant him one, save on an advisory basis.

The judgment is affirmed.

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[12] Although 28 U. S. C. §1441 permits removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction," the saving clause forbids a literal reading that would include actions of which a district court would have jurisdiction solely because of 28 U. S. C. §1333. *Hill* v. *United Fruit Co.*, 149 F. Supp. 470 (S. D. Cal. 1957).

CLARK, *Circuit Judge*, whom Judges HAYS and MARSHALL join, dissenting:

Commentators have had occasion to refer to the Jones Act, 46 U. S. C. 688, passed in 1920, as an example of "impossibly bad drafting." Gilmore & Black, The Law of Admiralty 282 (1957). But since 1940 "the Supreme Court has been rewriting the law" and the "rewrite job has gone far enough to make it clear that a revolution has taken place." *Ibid.* 248. In this process, recovery for personal injuries for unseaworthiness has practically swallowed Jones Act negligence, which remains only as a convenient tag upon which to ground jurisdiction "at law" and trial by jury as granted in the statute. It is now clear that claims based on unseaworthiness and on maintenance and cure may be joined with claims for negligence, and that there is a right of trial by jury on the unseaworthiness claim so joined. *Bartholomew* v. *Universe Tankships, Inc.*, 2 Cir., 263 F. 2d 437, certiorari denied 359 U. S. 1000; and see *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 380-381. Left undecided is the question here at issue, namely whether there is a right to jury trial on the claim for maintenance and cure when joined with a claim for Jones Act negligence.

[fol. 134] That this is a serious and troublesome issue is shown by the three different opinions held by us on this appeal. Differences are perhaps natural in view of the clash of policy between safeguarding a cherished admiralty right, long antedating the Jones Act, on the one hand, and the clarity and convenience of the unitary approach now being achieved under that Act on the other. The rationale of that approach seems such as to include all three of the claims we are considering in situations such as here disclosed, and we have concluded that they should be treated alike so far as the form of trial is concerned.

Before analyzing this more carefully we should note that a claim for maintenance and cure may be asserted on quite other facts than those of the accident giving rise to the claims for damages for personal injuries, and the claim may therefore be one remediable only in admiralty. What we are dealing with are overlapping claims arising out of a single accident—the situation here, as expressly alleged

in the complaint. Many of the cases cited by my brother Friendly to show the separate nature of the maintenance-and-cure claim are those where there were not overlapping claims or where the defendant did not show that an award so made involved double recovery, while others were those where the parties failed to object to a court trial. It seems that only lately has this problem of duplicating recoveries assumed the importance it deserves. But once perceived, there is no question about the answer and the need to avoid such duplication of recovery. Thus in the second *Bartholomew* case we remanded specifically for the deduction of such overlapping recoveries, holding the burden on the defendant to show the amount thereof. *Bartholomew* v. *Universe Tankships, Inc.*, 2 Cir., 279 F. 2d 911, 916-917, citing cases such as *McCarthy* v. *American Eastern Corp.*, 3 Cir., 175 F. 2d 727, certiorari denied 338 U. S. 911; *Smith* v. [fol. 135] *Lykes Bros.-Ripley S.S. Co.*, 5 Cir., 105 F. 2d 604, certiorari denied *Lykes Bros. Ripley S.S. Co.* v. *Smith*, 308 U. S. 604; and *Reardon* v. *California Tanker Co.*, 2 Cir., 260 F. 2d 369, certiorari denied 359 U. S. 926. See also Gilmore & Black, The Law of Admiralty 261 (1957). The inconvenience and often error of this duplicating form of trial points to the need for a rule of law preserving the unitary approach to include a claim for maintenance and cure, as well as of negligence and unseaworthiness, all arising out of the same accident. Further, the doctrine of collateral estoppel will bar relitigation of issues and facts settled in earlier litigation and may thus operate in particular instances even to cut down the jury trial now so thoroughly supported under the *Bartholomew* principle. See *McCarthy* v. *American Eastern Corp.*, *supra*, 3 Cir., 175 F. 2d 727, certiorari denied 338 U. S. 911; *Runyan* v. *Great Lakes Dredge & Dock Co.*, 6 Cir., 141 F. 2d 396; *La Fontaine* v. *The G. M. McAllister*, D. C. S. D. N. Y., 101 F. Supp. 826.

In the light of these well settled principles it would seem that careful analysis supports the teaching of practical convenience and necessity to the effect that the single claim or cause should be considered at the one trial. As Judge Friendly shows, a presently popular rationale treats the additional admiralty claims as "pendent" to the Jones Act

claim "at law" for negligence. See *Bartholomew* v. *Universe Tankships, Inc., supra*, 2 Cir., 263 F. 2d 437, 448, certiorari denied 359 U. S. 1000; *Romero* v. *International Terminal Operating Co., supra*, 358 U. S. 354, 380-381; *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 331. Another approach is that of Judge Lumbard in the first *Bartholomew* case, 2 Cir., 263 F. 2d 437, 448, that the Jones Act itself should be construed as broad enough to include all these claims in its aegis. These are but differing ways of stating the same result, which goes back to "the funda- [fol. 136] mental singleness of the underlying claim" where "the legal theories differ somewhat," but "from the standpoint of the parties the facts all exist as a single unit." Medina, *J.*, in 2 Cir., 263 F. 2d 437, 446, 447. To the writer clarity and convenience in thinking are promoted by viewing the situation in terms of the single cause of action, the identic factual situation which may give rise to several rights of action or legal remedies. "On any realistic appraisal there should be only one cause of action for jurisdiction and hence for trial. When a seaman has been injured his total claim should not be butchered up. He should be able to put it forward either wholly in admiralty without any right of jury trial, or wholly at law with a right of jury trial on *all* the issues." 5 Moore's Federal Practice 284 (2d Ed. 1951).

This points the way to a logical as well as convenient solution. When the claim for maintenance and cure is based on a cause of action unconnected with that upon which the claims of negligence and unseaworthiness are founded, then the claim must be pursued in admiralty and there is no right to a jury trial. When, however, all the claims are based on the same cause of action, then they must be tried as a unit and the right of jury trial accorded by the Jones Act applies to all the contentions. That is the situation here under the issues tendered by the complaint; and since the plaintiff pressed his claim for jury trial, the court was in error in reserving trial to itself.[1]

[1] Seemingly the scholarly commentators support the unitary approach and trial by jury as the preferred course. See Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27

[fol. 137] The approach we have made accords with the authorities we have cited and is not precluded by any specific precedent, so far as we are advised. True, there is much by way of dicta or lack of discussion or even overlooking of the point, all of which adds to the confusion. Actual decision is scanty to the point of nonexistence. This fact, plus undoubted dicta (in which the writer also has participated), does lend support to the approach of our brothers WATERMAN and SMITH, suggesting that we might still continue to rely upon our past statements, holding maintenance and cure a remedy always available also in admiralty, until the Supreme Court tells us otherwise. But notwithstanding our sympathy for this view, we are constrained to conclude that we must go where reason and practical necessity take us, namely to the unitary form of approach and the resulting trial by jury as we have outlined.

There remains the third approach to this issue, that set forth by Judge FRIENDLY speaking for himself and three other members of the court. We are constrained to hold this the least satisfactory of the three on policy, precedent, and logical analysis. First it is held that, while normally a jury trial may be had of maintenance and cure when jurisdiction is based on diversity of citizenship, such claim was here lost or waived by inadequate pleading or disclosure to the court. This, we suggest, is cavalier treatment of perhaps the most cherished of all procedural rights and is not justified on the record before us.[2] No precedent is

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U. Chi. L. Rev. 1, 4-6, 41-51, 58-65, esp. 63-64 (1959); Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 Harv. L. Rev. 817, 849, 850 (1960); 73 Harv. L. Rev. 138, 142-146 (1959); 5 Moore's Federal Practice 284 (2d Ed. 1951); Gilmore & Black, The Law of Admiralty 262 (1957).

[2] This is based in substance upon the failure of the complaint to set forth the plaintiff's citizenship, jurisdiction being there based on the Jones Act. But under modern civil procedure, the jury trial right comes from the Constitution, not the trial court, and such trial being once claimed (as here in the plaintiff's complaint) cannot be lost unless it is waived by written stipulation or oral stipulation made in open court. F. R. 38(b)-(d), 39(a); James, *Trial by Jury and the New Federal Rules of Procedure*, 45 Yale L. J. 1022 (1936); Clark, Code Pleading 113-122 (2d

[fol. 138] cited for this novel restriction on the jury trial right. Then it is held that all claims for maintenance and cure not brought in the court's diversity jurisdiction must invariably be tried to the court. This presents the unusual spectacle of a forced court trial and of course rejects the unitary approach by arbitrary fiat and not for policy or convenience in the large number of cases to which it is applicable.[2] The result is necessarily a rigid compartmen-

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Ed. 1947). There is no requirement that a party must plead in such a way as to warn the court of his constitutional right. Actually here the plaintiff's counsel in pressing his claim in successive colloquies at the opening of trial cut short by the judge's adverse rulings made broad contentions quite adequate to cover this issue. Thus he specifically cited jury trials of state actions at law for maintenance and cure. Indeed it is difficult to see how he could have put his claim more inclusively unless he could have foreseen the novel trend my brothers' opinion was later to take. Rather inconsistently they hold that the claim for jury trial of the issue as *pendent* to the main issue was sufficiently asserted to require disposition even though "pendent" was never mentioned in the colloquies. Further the court is bound to examine the entire record to see if San Martin's citizenship was there disclosed. *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 2 Cir., 234 F. 2d 253, 257-258, and amendment of the pleadings, even on appeal, is directed by 28 U. S. C. §1653. See *Brooks* v. *Yawkey*, 1 Cir., 200 F. 2d 663, 664.

[2] This appears to be a complete acceptance in this area of the law, and a rejection of our settled rule to the contrary, of the holding in *Jardine* v. *Walling*, 3 Cir., 185 F. 2d 662, that jury trial of the issue of maintenance and cure constitutes reversible error. This holding, which has been widely criticized by scholars—see the writers cited in note 1 *supra*, and notably Professors Moore and Currie—has not been followed in the First Circuit, where the practical need of jury trials has been ably set forth by Judge Wyzanski in the oft-cited case of *Jenkins* v. *Roderick*, D. C. Mass., 156 F. Supp. 299, 304-306, following *Doucette* v. *Vincent*, 1 Cir., 194 F. 2d 834, 840, 846. We have cited with approval Professor Moore's criticism, 5 Moore's Federal Practice 2814-2815 (2d Ed. 1951), *supra*, of the *Jardine* case as improperly dividing up a single cause of action, and have never found error in the submission of this issue to a jury. *Gonzales* v. *United Fruit Co.*, 2 Cir., 193 F. 2d 479, 480, n. 1; see also *Reinequist* v. *Isthmian S.S. Co.*, 2 Cir., 205 F. 2d 486, and *McAllister* v. *Cosmopolitan Shipping Co.*, 2 Cir., 169 F. 2d 4, reversed on another issue, 337 U. S. 783. A dictum in a footnote in *Weiss* v. *Central R. Co. of N. J.*, 2 Cir., 235 F. 2d 309, 310, n. 1, has occasionally been mis-

[fol. 139] talized system where jury trial must be had in some of the cases, and court trial in others. Since this division is unconnected with the practicalities of the situation, since in this type of case it is easy to overlook the citizenship of the parties where the Jones Act is the primary source of federal jurisdiction, we must necessarily expect reversals based on form rather than substance.* We fear the unsatisfactory results which will ensue from this novel formalism in the general maritime law.

Our conclusion therefore is that the district court erred in depriving the plaintiff of his asserted right to a jury trial of his entire cause of action. The judgment should therefore be reversed and the action remanded for a trial to the jury.

SMITH, *Circuit Judge*, concurring in the result:

Judge Waterman and I concur in the result reached by Judge Friendly and our three colleagues who have concurred in his opinion. We affirm, with them, the action of the court below. We agree that when a maintenance and cure claim arising out of the same event that gave rise to the Jones Act claim is coupled with the Jones Act claim and therefore tried on the "law side" of the court, and the

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read as expressing a preference for court trial of this issue, even though it cited and relied on the *Gonzales* case, and only ventured to suggest that the trial judge had also discretion to order a court trial. That suggestion we now believe should be withdrawn for the reasons stated in the text of this dissent.

*The stress placed on the supposed compulsion of F. R. 39(c) seems out of place, for the rules provide only a procedure for working out the substantive rules of trial elsewhere stated, as in the Constitution or statutes. If a trial judge does take a jury verdict when he is not required to do so, error cannot be assigned on his action. *Hurwitz* v. *Hurwitz*, D. C. Cir., 136 F. 2d 796, 799, 148 A. L. R. 226; *Rath* v. *Wilgus*, 110 Neb. 810, 195 N. W. 115; *Groome* v. *Steward*, D. C. Cir., 142 F. 2d 756; Clark, Code Pleading 90, 102, 106, 107 (2d Ed. 1947).

[fol. 140] parties are of diverse citizenship,[1] the maintenance and cure claim must be tried to a jury. We agree that, when the parties are not of diverse citizenship, even though the Jones Act claim is tried to a jury, it is proper to try the maintenance and cure claim to the judge alone.

We are also of the opinion, however, and in this respect we differ from our colleagues, that in this latter situation the trial judge may deem it advisable to submit the maintenance and cure claim to the jury along with the Jones Act claim, and if this is done we would not consider such a submission erroneous but well within a proper discretion so as to preserve a unitary case.

When in a non-diversity case a maintenance and cure claim is presented for adjudication with a Jones Act claim, but the maintenance and cure claim does not arise out of the same event as the Jones Act claim, we are of the opinion that the maintenance and cure claim should always be tried to the court alone, and never submitted to the jury, even if the Jones Act claim is jury-submitted.

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[1] By the phrase "diverse citizenship" we include all prerequisites for so-called "diversity jurisdiction" on the law side of a federal district court, not simply a pleading that the parties are residents of different states.

[fol. 141]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Thurgood Marshall, Circuit Judges.

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MARTIN, deceased, Plaintiff-Appellant,

v.

UNITED STATES LINES COMPANY, Defendant and Third Party Plaintiff-Appellee,

UNITED STATES OF AMERICA, Third Party Defendant.

JUDGMENT—June 29, 1962

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the defendant-appellee.

A. Daniel Fusaro, Clerk, by Vincent A. Carlin, Chief Deputy Clerk.

[fol. 142]

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF NEW YORK

I, A. DANIEL FUSARO, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from Vol. I Pgs. 1a-90a; Vol. II Pgs. 91a to 142a, inclusive, contain a true and complete transcript of the printed portions of the record and proceedings had in said Court, in the case of

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MARTIN, deceased, Plaintiff-Appellant,

against

UNITED STATES LINES COMPANY, Defendant and Third Party Plaintiff-Appellee,

UNITED STATES OF AMERICA, Third Party Defendant.

as the same remain of record on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-fourth day of September, in the year of our Lord one thousand nine hundred and sixty-two, and of the Independence of the said United States the one hundred and eighty-seventh.

A. Daniel Fusaro, Clerk, by Vincent A. Carlin, Chief Deputy Clerk.

Clerk's Certificate (omitted in printing).

[fol. 143]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 10, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to the following question:

Does a seaman have a right to a jury trial on a claim for unpaid maintenance and cure when joined with a claim for Jones Act negligence?

The case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U.S.
FILED
SEP 26 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1962

No. 463

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of Andres San Martin, deceased,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER,
Attorney for Petitioner.

Of Counsel:
JACOB RASSNER,
BENJAMIN GLICKMAN,
THEODORE H. FRIEDMAN

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Supreme Court of the United States

October Term, 1962

No.

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of Andres San Martin, deceased,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 29, 1962.

Opinions Below

The opinions of the Court of Appeals dated June 29, 1962 and of the United States District Court for the Southern District of New York dated June 29, 1960 have not yet been reported, and are set forth in full in the Appendix hereto.

Jurisdiction of This Court

The judgment of the Court of Appeals was entered on June 29, 1962.

The jurisdiction of this Court is invoked under 28 U. S. C. Sections 1254(1) and 2101(c).

Questions Presented

1. Does a seaman have a right to a jury trial on a claim for unpaid maintenance and cure when joined with a claim for Jones Act negligence?

2. Does a seaman have a right to a jury trial on a claim for unpaid maintenance and cure when the record shows that diversity of citizenship existed between the parties?

3. Is a seaman entitled to have submitted to a jury as part of his Jones Act suit his claim for aggravation of injuries caused by failure to provide timely and adequate maintenance and cure?

4. Has a seaman's right to a proper jury trial on his Jones Act claim been violated when a trial court excludes the sole independent evidence of prior complaints and notice to the shipowner of the alleged dangerous condition?

Statement

Petitioner's intestate, an able bodied seaman, was directed by respondent's ship's officer manually to carry numerous articles, including several one hundred pound barrels of cement and one two hundred pound barrel, up an inclined ship's gangway in the Port of New York on November 6, 1954. He alleged that this procedure was improper and dangerous and that instead of manually carrying the goods aboard, a pallet, skid or platform, attached to the ship's winches, should have been used to lift the goods mechanically from the pier to the ship's deck.

Petitioner's intestate alleges that he twisted his back and suffered injuries thereto as a result of this work. He further alleged that the strain of this work caused injury to his heart.

Petitioner's intestate was subsequently treated at the United States Public Health Service facilities in New York, and his condition was diagnosed as herniation of the nucleus polposus—a ruptured spinal disc. The U.S.P.H.S. physicians also determined that a cardio vascular condition—an aneurysm of the thoracic aorta, constituting an enlargement and stretching of the walls of the major blood vessel leaving the heart—was present.

Petitioner's intestate was discharged from the U.S.P.H.S. Staten Island Hospital on March 1, 1955, after 48 days of in-patient treatment, as having received maximum hospital benefits. He received no further treatment.

Respondent refused to pay him any maintenance and cure, except for $34, covering a four-day period in December, 1954 when petitioner was an out-patient and before he entered the hospital.

The complaint asserted Jones Act negligence and unseaworthiness of the vessel, seeking $75,000 damages. This cause of action also asserted that the respondent was further negligent "in failing to provide the plaintiff with timely, adequate, proper and competent medical care and attention and maintenance and cure, thereby aggravating his condition."

A second cause of action was also alleged, seeking $10,000 for unpaid maintenance and cure and earned wages.

At the outset of the trial on May 12, 1960, petitioner's counsel stated to the trial court that he desired a jury trial on all issues. A jury demand as to all causes of action had been duly endorsed on the original complaint.

The trial court nevertheless ruled that the claims relating to maintenance and cure were to be tried to the court only, without a jury. Petitioner's counsel orally argued to the trial court that an action for maintenance and cure was

a common law action that existed prior to the establishment of the admiralty jurisdiction of the Federal Court, that it was properly brought on the law side of the Federal Court by the petitioner, and that the claims relating to maintenance and cure could have been brought in the State Court where petitioner without question could have had a jury trial on the maintenance and cure issues. In the brief oral argument which occurred before the trial court made his final ruling that there would be no jury trial of the maintenance and cure issues, petitioner's counsel cited to the trial court the authority of *Jenkins* v. *Roderick*, 156 F. Supp. 299 (D. Mass. 1957).

Petitioner's position was rejected in entirety by the trial court, and prior to the receipt of any evidence, the trial court directed that all issues relating to maintenance and cure be tried to the Court, stating:

> "and if there is any additional testimony necessary, I will hear that after the jury has rendered its verdict."

At the trial the petitioner's intestate testified that he had complained to his immediate superior, one Manzo, that the manual loading procedure was "too dangerous", but he was ordered to continue the work in the same manner. Respondent's counsel was permitted to advise the jury that Manzo had died during the pendency of the litigation.

Both sides presented experts as to the propriety of the manual loading procedure, as against the use of the ship's winches. The experts of each side directly contradicted each other.

Petitioner's intestate presented a fellow working seaman, one Murrell, who had helped him during the loading work on the day of the accident and on previous occasions when similar manual loading work was done. The trial court refused to allow Murrell to testify that on the earlier occasions, when loading even lighter goods than

involved on November 6, 1954, the date of petitioner's intestate's alleged injury, he, Murrell, had complained to the ship's superiors that the manual loading procedure was dangerous.

Petitioner had originally claimed that the gangway used for the loading work had rope instead of wooden handrails, and was therefore defective. Respondent accordingly impleaded the United States of America, which had provided the gangway, as a third party defendant.

The claim of rope handrails was withdrawn at the close of petitioner's case and the third party action against the United States therefore discontinued. A stipulation to that effect was read to the jury.

Petitioner pressed his claim that the manual procedure and use of the gangway to load the barrels of cement and ship's stores had constituted a dangerous procedure, particularly inasmuch as the gangway was necessarily set on rollers and the ship was floating and moving with the harbor currents and tides.

Both sides presented medical expert evidence to the jury as to the cause and extent of petitioner intestate's back and cardiovascular conditions. Petitioner's experts stated that the back condition had been caused or "lighted-up" by the strain of manually carrying the 100 pound barrels of cement up the inclined gangway on November 6, 1954. Petitioner's medical experts also asserted that the previously non-disabling aneurysm of the thoracic aorta had been strained, aggravated and rendered into a disabling condition as a result of the described manual effort. The respondent's physicians denied these claims in entirety.

No evidence was presented to the jury of the need for present treatment, or of the aggravation of petitioner's intestate's medical condition due to the respondent's failure to provide timely or adequate medical care or maintenance and cure following his injury of November 6, 1954.

The jury was directed by the trial court to return a special verdict, and answer 6 different questions with subparts constituting 12 questions. The jury found for the respondent on the ground that there was neither unseaworthiness or negligence.

The trial court thereupon held additional hearings without the jury for the purpose of determining the issues relating to maintenance and cure. Petitioner sought a large sum for the unpaid maintenance and cure and for damages arising from the failure to pay the same, asserting that his discharge from the U.S.P.H.S. Staten Island Hospital on March 1, 1955 did not constitute completion of his need for curative medical care, that he had been left without required medical care for the several intervening years despite his need for same, and that at the time of trial in June 1960 he was still in need of medical care, both for his back and cardio vascular condition.

The trial court chose to disbelieve the testimony of the former Chief of the Orthopedic Service of the U.S.P.H.S. Staten Island Hospital where petitioner's intestate had been treated in 1955, who testified on petitioner's behalf that petitioner's discharge from the U.S.P.H.S. hospital as an in-patient with maximum hospital benefits was not to be equated with a finding that maximum recovery had been achieved or with a finding that no further beneficial medical care was possible or required. The trial court also rejected the same physician's conclusions, based on his examination of the petitioner's intestate and the hospital record, that at the time of trial and throughout the intervening time petitioner's intestate was in need of and would benefit from further non-surgical orthopedic therapy, which would have the curative effect of converting petitioner's intestate's condition from one of complete disability to one allowing him to perform work as a watchman or of a sedentary nature.

The trial court similarly chose to disbelieve petitioner's cardiac experts who testified that petitioner's intestate's cardio-vascular condition had been non-disabling prior to his service on respondent's ship, that it had grown more severe during his 13 months service aboard the ship, and that at the time of trial petitioner's intestate was in congestive heart failure and in sharp need of medical care. Petitioner intestate died on November 6, 1960, four months after the trial, of congestive heart failure.

It was on the above issues that petitioner sought and was denied a jury trial, for had a jury elected to believe petitioner's experts rather than respondent's, a substantial sum in maintenance and cure would necessarily have been awarded and petitioner's intestate would have received the medical care his physician testified he was urgently in need of at the time of trial.

Reasons for Granting the Writ

The treatment of this case on the appeal to the Circuit Court is perhaps the best proof of the validity of the instant petition for a writ of certiorari.

The original panel, consisting of Chief Judge Lumbard, former Chief Judge Clark, and Circuit Judge Friendly, after oral argument on January 12, 1962, on the Court's own motion, "determined that the case should be considered in banc" (37, *infra*). The Circuit Court noted that the determination of the majority of the panel (Chief Judge Lumbard and Circuit Judge Friendly), which ultimately became the Court's opinion on behalf of four of the nine Circuit Judges, "conflicted with a recent dictum on the subject by this Court" (37, *infra*). The serious importance of the question of jury trial of a claim for maintenance and cure was recognized as a "problem (which) constantly recurs in the district courts" (37, *infra*), and therefore required definitive determination and in banc consideration.

Then in banc consideration, however, did not result in such definitive determination, because it "produced a variety of views, with none commanding a majority" (37, *infra*).

Four Circuit Judges (Chief Judge Lumbard and Circuit Judges Moore, Friendly and Kaufman), in an opinion by Judge Friendly (35-59, *infra*), held that petitioner as a matter of law could not receive a jury trial of a claim for maintenance and cure, and therefore voted for affirmance of the result below.

Three Circuit Judges (former Chief Judge Clark and Circuit Judges Hayes and Marshall), in an opinion by Judge Clark (60-66, *infra*), held that as a matter of law petitioner was entitled to a jury trial on the maintenance and cure claims, and therefore voted for reversal.

Two Circuit Judges (Circuit Judges Waterman and Smith), in an opinion by Judge Smith (66-67, *infra*), held that it was a matter of discretion for the trial court whether or not to grant a seaman a jury trial on a maintenance and cure claim, and that the action of the trial court in the instant case was not subject to reversal, and therefore voted for affirmance.

Thus by a 5 to 4 vote, and upon an expression of three entirely different viewpoints, the petitioner's appeal was rejected and the result below affirmed.

It is obvious that the consideration of this case by the Circuit Court has not only not settled the questions inherent in the appeal, but raised more problems. In view of the fact that appellate appeals are heard by a panel of only three Circuit Judges, it is now impossible for a District Court within the Second Circuit to predict whether the decision it makes at the inception of a maritime case to reserve the maintenance and cure issues for the Court alone or to submit them to the jury will be affirmed or re-

versed. Only the happenstance of which particular judges will be sitting on the panel at the time of appeal will decide whether what the trial court has done will be affirmed or reversed, and this will be so regardless of which decision it makes. In view of the troublesome division of the Circuit Court on this issue, and the lack of any majority opinion, it is likely that the principle invoked by Judge Clark in *Dunbar* v. *Henry DuBois' Sons Co.*, 275 F. 2d 304, 306 (2nd Cir. 1960), cert. denied 364 U. S. 815:

> "that in a proper case a panel of this Court may frankly state its disagreement with the decision of another panel and refuse to be bound thereby"

will be invoked on the review of the questions here involved, unless this Court renders an authoritative determination of the issue.

Further emphasizing the need for authoritative determination of the issue by this Court is the fact that the District Courts in New York handle a heavy concentration of maritime litigation. As noted in *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 350 U. S. 573, this Court will grant a writ of certiorari even where there is an apparent lack of conflict with other Circuits if the question raised is an important one, and there is a heavy concentration of similar litigation within the Circuit involved.

There can be no question that the issue of the right to a jury trial is one that is basic and vital to every litigant and one which arises in every litigation of this type. It involves an important decision as to the entire conduct of the trial, order and form of presentation of evidence, and instruction of the jury. The decision must be made at the very inception of the proceeding by the trial judge. It affects one of the most cherished and constitutionally protected rights of all litigants before our courts.

Thus the review that is here sought is not one which merely affects this petitioner, but one which involves a

basic principle and the basic rights of all seamen having need of the protection of our courts, and one which affects the basic nature of the conduct of innumerable litigations within the Federal Court system. It would, therefore, seem that the criteria for granting of a writ of certiorari are met herein.

Additionally it must be noted that the determination of the Circuit Court in the instant matter is in direct conflict with the policy and decisions of the First Circuit. That Circuit provides jury resolution of all aspects of seamen's actions, including their maintenance and cure claims. See *Mitchell v. Trawler Racer, Inc.*, 265 F. 2d 426, 427 (1st Cir. 1959), reversed on other grounds, 362 U. S. 539 (1960); *Jenkins* v. *Roderick*, 156 F. Supp. 299, 304-306 (D. Mass. 1957).

On the other hand, the First Circuit is in direct conflict with the view of the Third Circuit that jury trial of a maintenance and cure claim is improper and reversible error, as expressed in its leading case of *Jordine* v. *Walling*, 185 F. 2d 662 (3rd Cir. 1950).

This petition has deliberately not sought to persuade this Court that error was committed below, notwithstanding that petitioner is deeply persuaded that error did occur and that petitioner was harshly and improperly deprived of his fundamental right to a jury trial.

Petitioner, however, assumes that the function of a petition for writ of certiorari is to demonstrate that an important legal question is present and that conflict exists in and between the Circuit Courts, which conflict requires resolution by this Honorable Court. On performing this limited function, the purpose of the petition is completed—argument as to the error of the Court below is required to await the submission to this Court of this case on its merits, if the writ of certiorari be granted.

Furthermore, in the instant case, reference, without further argument, to Judge Clark's opinion (60-66, *infra*) would seem sufficient for the purpose of this petition. Judge Clark, in his opinion, spoke eloquently of the "cavalier treatment of perhaps the most cherished of all procedural rights" (64, see also 64 fn. 2, *infra*) dealt by the majority of the Circuit Court to petitioner's quest for a jury trial herein. Judge Clark's opinion (61-62, 65 fn. 3, *infra*) also clearly sets forth the basic policy justification for a jury trial of a seaman's maintenance and cure claim, and the avoidance thereby of the double recovery problems and complications of the charge to the jury discussed more fully in *Bartholomew* v. *Universe Tankships, Inc.*, 279 F. 2d 911, 916-917 (2nd Cir. 1960) and *Jenkins* v. *Roderick*, 156 F. Supp. 299, 304-306 (D. Mass. 1957).

There are only two additional points to be made by petitioner.

A.—Petitioner had an unquestionable Jones Act claim for damages alleged in the complaint of the failure of the respondent "to provide * * * timely, adequate, proper * * * maintenance and cure, thereby aggravating his condition." See *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 371 (1932); *Sims* v. *U. S. of A. War Shipping Admin.*, 186 F. 2d 972, 973 (3rd Cir., 1951), cert. denied 342 U. S. 816 (1951); *Murphy* v. *Light*, 258 F. 2d 323 (5th Cir. 1958); cf. *Brown* v. *Dravo Corp.*, 258 F. 2d 704 (3rd Cir. 1958), cert. denied 359 U. S. 960 (1959).

The petitioner presented no evidence on these issues to the jury herein because the trial court had at the inception of the trial instructed petitioner's counsel to reserve "any additional testimony necessary (to the maintenance and cure claims) and I (the trial court) will hear that after the jury has rendered its verdict." To now assert, as Judge Friendly does (40, *infra*), that this right to a jury determination was surrendered by petitioner because "no evidence was adduced (before the jury) to support it"

(40, *infra*) is to penalize the petitioner because his counsel followed the previously announced firm direction of the trial court that all matters relating to maintenance and cure would be tried by the court alone at hearings to be held subsequent to the return of the jury verdict.

It should be clear that counsel may not be deemed to waive rights or parties be penalized because a previously announced ruling of a trial court is conformed to throughout the remainder of the trial. See *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 519 (2nd Cir. 1952), cert. denied 343 U. S. 966 (1952); and particularly so where as basic a right as the one of a seaman to a jury trial is involved. See, *Michalic* v. *Cleveland Tanker, Inc.*, 364 U. S. 325 (1960); *Sentilles* v. *Inter Caribbean Shipping Corp.*, 361 U. S. 107 (1959); *Ferguson* v. *Moore McCormack Lines*, 352 U. S. 521 (1957); *Jacob* v. *City of New York*, 315 U. S. 752 (1942). See, also, *Troupe* v. *Chicago D. & G. Bay Transit Co.*, 234 F. 2d 253, 261, fn. 3 (2nd Cir. 1956).

B.—Petitioner appealed to the Circuit Court on the additional ground that the trial court improperly excluded the sole independent eye-witness evidence supporting petitioner's claim that respondent's officers had been warned by the working personnel that the manual loading procedure for ship's stores was difficult and dangerous (see pp. 4-5, *supra*). As is clear from the opinion of the Circuit Court, this appeal was well taken by the petitioner, for the trial court was held to have been clearly wrong in its exclusion of this evidence. (See 39, *infra* and the cases there cited by Judge Friendly.)

Notwithstanding acceptance of petitioner's contention, the Circuit Court determined for itself that "the probative effect of the excluded evidence would not have been great" (39, *infra*) and held the exclusion of the evidence, though error, not to be grounds for directing a new jury trial.

In so doing the Circuit Court took upon itself the function of the jury to weigh and determine the effect and probative value of evidence. The Circuit Court did so in a case involving a seaman where jury resolution of disputed factual issues and inferences therefrom is particularly held to be inviolate. *Michalic* v. *Cleveland Tankers, Inc., supra, Sentilles* v. *Inter Caribbean Shipping Corp., supra, Ferguson* v. *Moore McCormack Lines, supra, Jacob* v. *City of New York supra.*

This action of the Circuit Court was particularly improper because it involved an item of evidence which was crucially determinative of petitioner's case before the jury. The only evidence, other than the matter excluded by the trial court and not heard by the jury, of the dangerous nature of the manual loading procedure, was petitioner's intestate's own testimony and that of his experts. His own tetimony was, of course, suspect as that of an interested party. This was so particularly in the trial setting, inasmuch as the petitioner's intestate spoke no English and testified through a Spanish interpreter, and the fact that he had a long-standing syphilitic infection was known to the jury and not left undiscussed by respondent's trial counsel.

In such circumstances petitioner's need for independent corroborating testimony was extreme. The Circuit Court's response was that he obtained this through the testimony of his maritime experts (39, *infra*), but since respondent presented an equal number of experts who testified to the contrary, it was more than likely that both sets of experts merely cancelled each other out. Not only was the petitioner deprived of the benefit of Murrel's testimony in support of the petitioner, but the jury's failure to receive any testimony from Murrell of prior complaints could serve only to create a conviction on their part that petitioner's intestate had testified falsely when he charged that the men had complained of the danger of the manual loading procedure and that the work was dangerous.

Proof that a prior complaint of the dangerous procedure had been given to respondent's officers was vital to petitioner Jones' Act negligence claim on the legal issue of notice and for the persuasive purpose of convincing the jury that the respondent's ship's officers had acted improperly and without due care and concern for the safety of their manual workmen. It is doubtful whether petitioner was entitled to a verdict on unseaworthiness on the grounds of adoption by the ship's officers of an improper work procedure, if the law is as was recently stated in *Pinto* v. *States Marine Corp.*, 296 F. 2d 1, 3 (2nd Cir. 1961), cert. denied 369 U. S. 843 (1962).

Thus the evidence erroneously excluded by the trial court was the sole independent evidence of the crux of petitioner's case.

It is respectfully submitted that in principle it is just as erroneous to fail to reverse and remand a case where evidence has been concededly erroneously excluded as it is for a court to dismiss a case because it does not believe certain evidence is sufficiently probative or forceful to justify a jury determination in the first instance. It is well settled, particularly in seamen's actions, that failing to allow a plaintiff a jury determination of the weight and effect of disputed evidence is error. *Michalic* v. *Cleveland Tankers, Inc., supra; Sentilles* v. *Inter-Caribbean Shipping Corp., supra; Ferguson* v. *Moore-McCormack Lines, supra; Jacob* v. *City of New York, supra.*

In analagous circumstances, this Court, in *Byrd* v. *Blue Ridge Rural Elec. Coop.*, 356 U. S. 525, 528-533 (1958), held that it was error for a Circuit Court to deprive the petitioner, a personally injured power line worker, of the right to submit evidence to a jury and obtain its determination of the weight of that evidence following a finding by the Circuit Court that the District Court had erroneously excluded evidence and adopted an improperly narrow theory of the scope of the issues to be determined by the jury.

In this respect the discussion in *Byrd* directly suggests the error of the treatment rendered by the Court of Appeals for the Second Circuit in the instant case, both of the issue of non-presentation to the jury of evidence as to petitioner's Jones Act claim for aggravation of injuries due to failure to provide maintenance and cure, following the trial court's ruling that such evidence and issues would not be presented to the jury but would be decided by the court alone, and the issue of the Circuit Court's failure to remand the case for a new trial after determining that evidence was erroneously excluded, holding instead that it believed that "the probative effect of the excluded evidence would not have been great" (39, *infra*).

As this Court's opinion in *Byrd* clearly indicates, the petitioner should have received a new trial so that he could present evidence to a jury on the additional issues of unpaid maintenance and cure now found to be proper matters for the jury and for the purpose of permitting a jury, rather than a Circuit Court, to determine the effect of the erroneously excluded evidence.

Were this Court to allow review of this issue, as well as the issue of jury trial of a maintenance and cure claim, it would not be merely reviewing conflicting inferences from a set of facts. The purpose of review of this issue would be to determine whether a Circuit Court, upon recognizing clear error in the admission or preclusion of important evidence in the trial of a seaman's personal injury action may itself undertake the function of the jury in determining the effect such evidence would have had upon the jury, or must the Circuit Court instead preserve the inviolate right of a seaman (or any litigant in the Federal Court system; see *Byrd* v. *Blue Ridge Rural Elec. Coop.*, 356 U. S. 525, 537-539; 1958) to a full jury determination of the evidence and the disputed factual issues and inferences therefrom.

It is respectfully submitted that this Court may and should grant a writ of certiorari herein so that this Court can declare itself on these issues for the proper guidance of the lower courts.

CONCLUSION

In view of the basic nature of the issues here involved and their relationship to the whole scope of maritime liability and the proper conduct of innumerable maritime personal injury cases now pending in the District Courts, and the different positions taken on the issue of a seaman's right to a jury trial on his maintenance and cure claims by the different Circuit Court Judges of the Court of Appeals for the Second Circuit, and the conflict between the Courts of Appeals for the First Circuit and the Third Circuit on the same issue, petitioner respectfully prays that a writ of certiorari issue herein to the Court of Appeals for the Second Circuit.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

Of Counsel:

JACOB RASSNER,
BENJAMIN GLICKMAN,
THEODORE H. FRIEDMAN.

APPENDIX

Opinion, Findings of Fact and Conclusions of Law of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Appearances:

BENJAMIN GLICKMAN, Attorney for Plaintiff, 305 Broadway, New York, N. Y.

JACOB RASSNER, Counsel for Plaintiff, 15 Park Row, New York, N. Y.; THEODORE H. FRIEDMAN, of Counsel.

LEVET, D. J.

The first cause of action herein was an action under the Jones Act (46 USCA § 688), based upon the alleged negligence of the defendant and upon the alleged unseaworthiness of the vessel. This issue was tried to the Court and jury and a verdict thereon rendered for the defendant.

The second cause of action, for maintenance and cure, was tried before the court. All relevant testimony taken before the jury and subsequently before the court has been considered.

After hearing the proofs and evidence of the parties, and after examining the pleadings, exhibits, briefs and requests to find submitted, I find as follows:

FINDINGS OF FACT

1. Plaintiff, a seaman, born December 31, 1897, was employed aboard the defendant's vessel, the SS American Reporter, as a crew member in the capacity of a wiper from on or about November 3, 1953 to December 15, 1954.

2. The defendant, United States Lines Company, is a corporation doing business within the State of New York. Through the aforesaid period of employment said defendant owned, operated, managed and controlled the said SS American Reporter.

3. Prior to said employment by defendant, plaintiff was given a pre-employment physical examination by defendant's physician and was accepted for employment. The ordinary pre-sign-on examination would not have revealed the aneurysm hereinafter referred to. A chest x-ray would have been required.

4. In 1945, plaintiff was told that he had contracted syphilis. This went untreated for a number of years and had produced an aneurysm of the ascending aorta of plaintiff's heart and heart failure for which he was subsequently treated by a private doctor, Dr. Frank Spindler, from March 2, 1952 to September 18, 1953. Dr. Spindler informed plaintiff of his said ailments and indicated he might work at his calling.

5. The plaintiff at no time disclosed to defendant the fact that he had syphilis or that syphilis had produced an aneurysm of the ascending aorta and heart failure.

6. On December 5, 1954, while the ship was at sea, the plaintiff reported to the purser complaining of pains in his lower back and left leg, which condition plaintiff said originated on November 4, 1954; as a result the plaintiff became disabled and unfit for duty aboard said vessel on December 13, 1954. On December 15, 1954, after further complaints, plaintiff requested a hospital slip, and a master's certificate was that day issued to him to obtain "treatments of rheumatic pains in leg."

7. While plaintiff served on the SS American Reporter there were no manifestations of his cardio-vascular condition or any complaints from him relating thereto; his sole purpose in signing off the vessel on December 15, 1954 was to obtain treatment for his leg.

8. Plaintiff was treated as an out-patient for said complaints and pains at the United States Public Health Service Out-Patient Clinic at 67 Hudson Street, New York, N. Y., from December 20, 1954 to January 12, 1955, and as an in-patient at the United States Public Health Service Hospital at Stapleton, Staten Island, New York, from January 12, 1955 to March 1, 1955. Here, the sole complaint of plaintiff was "pain in the muscle of the left calf for 2 months."

9. During the course of these treatments at the Marine Hospital at Hudson and Jay Streets, New York, N. Y., the aneurysm of the ascending aorta was noted.

10. There is no evidence that plaintiff's condition relating to his cardio-vascular system, i.e., the enlargement of the cardiac vessels, became disabling during the period of plaintiff's service aboard defendant's vessel or that the service of plaintiff aboard such vessel aggravated such condition.

11. The plaintiff was admitted to the United States Marine Hospital at Stapleton, Staten Island on January 12, 1955 and he remained there until discharged on March 1, 1955. The diagnosis there was (1) aneurysm of aorta due to arteriorsclerosis; (2) herniation of nucleus pudposus due to unknown cause; (3) syphilis of undiagnosed site. The prognosis was guarded and the disability was stated "not fit for duty indefinitely." The plaintiff denied chest

pain and upon admission to the Marine Hospital made no complaint with respect to his cardio-vascular condition. He was held not to be a candidate for surgery (as to the herniation) because of the aneurysm.

12. The plaintiff's condition relating to his back and left leg, i.e., the herniation of the nucleus pulposus at the L5-S1 level at the left, arose while plaintiff was in the service of the defendant's vessel and on or about November 4, 1954.

13. At the time of his discharge from the Marine Hospital on March 1, 1955, plaintiff had reached the point of maximum possible cure as to his back condition. There was no further treatment which could have improved his condition.

14. On March 1, 1955, the plaintiff had reached the maximum cure as to the cardio-vascular condition, and on October 30, 1957 and April 28, 1960 was not suffering from congestive heart failure. (See testimony of Dr. Eugene Clark.)

15. The plaintiff has not received any medical treatment for his back or cardio-vascular conditions since his discharge from the Marine Hospital at Stapleton, Staten Island, New York on March 1, 1955.

16. The plaintiff is entitled to recover maintenance and cure at the rate of $8.00 per day from December 15, 1954 to January 12, 1955—28 days—for a total of $224.00.

DISCUSSION

The testimony of the principal witnesses is as follows:

Dr. Irving Mauer, an orthopedic surgeon of considerable standing, testified upon behalf of plaintiff.

He testified that when he examined the plaintiff on May 2, 1960, he found the following conditions: Limitation of back motion; limitation of straight leg raising; weakness; absence of the left ankle jerk; weakness of the left extensor halluois longus with hypasthesia over the lateral aspect of the left leg extending to the lateral aspect of the foot. He also found varicosities affecting both lower extremities; atrophy of the left thigh and atrophy of the left calf; tenderness along the spinous and interspinous ligaments.

Dr. Mauer stated that in his opinion the plaintiff had not reached the maximum cure with respect to his back.

The treatment which he recommended is the so-called "conservative treatment", consisting of (1) wearing a brace; (2) physiotherapy; and (3) injection of vitamin B-12. These treatments would cover periods of from one year to 18 months, and apparently would cost between $1,420 and $2,120. During the treatment recommended, the exercise tolerance would have to be built up by reason of the cardiac situation. This treatment, in the opinion of Dr. Mauer, would partially restore the plaintiff to a condition in which he might work at nonarduous tasks such as an elevator operator, an assembler of parts or a job conducted in a sedentary manner.

Dr. Mauer reiterated the above opinion in spite of the fact that the hospital records of the Marine Hospital indicated that on March 1, 1955 the patient, San Martin, had received maximum hospital benefits and in spite of the further fact that Dr. Mauer was a member of the staff of that hospital at that time, although it appears that he was not one of the reporting examiners as to this particular patient.

Dr. Irwin Balensweig, who is an orthopedist and traumatic surgeon, testified in substance as follows:

He examined the plaintiff on June 25, 1956 and on May 13, 1960 and he stated that he had reviewed the hospital records and taken certain X-drays.

The hospital records at the Marine Hospital indicated that at the time of discharge San Martin had reached maximum hospital benefits, and Dr. Balensweig said that in his opinion also San Martin had reached maximum medical treatment benefits at that time. He indicated that there would be no benefit from further therapy treatments now; that a brace would not correct the herniated disc, if there were one, and that the injection of vitamin B-12 was not used in the treatment of backs. Dr. Balensweig concluded by stating that there was nothing to do for San Martin except that San Martin should adapt himself to his complaints.

Dr. Frank Spindler, an internist and general practitioner, testified that he treated the plaintiff some 82 times from March 4, 1952 to September 18, 1953, treating both a syphilitic condition and a heart condition. He talked to the plaintiff about his heart condition and advised hospitalization.

However, on or about September 18, 1953, Dr. Spindler examined the plaintiff, who then complained only of nervousness. Dr. Spindler then gave it as his prognosis that the plaintiff could work.

Dr. Spindler examined the plaintiff again on May 27, 1960. "I again took his blood pressure; it was 150 systolic over 90 diastolic. I listened to the heart. He had an enlarged heart, regular beat, 100 per munite. He had an aortic systolic murmur and an aortic diastolic murmur. The apex of the heart was displaced to the sixth interspace about 4 centimeters to the left of the nipple. I again fluoroscoped him and he demonstrated this time the enlargement of the heart, but with two densities, the density I described originally to the right ventricle and another density on the arch of the aorta, which, without doubt, is an aneurysm. I weighed him. I gave him some treatment."

Dr. Spindler testified that San Martin had not reached the maximum cure for the cardio-vascular condition and he

recommended the following treatment: Treatment would consist of what Dr. Spindler called "compensation", by the removal of the fluid from the tissues of the body, either from the base of the lung or the extremities, upper or lower, or at any other soft tissue parts of the body. The method used is the standard mercurial diuretics together with new agents found within the last year. This treatment, the doctor said, would require from three to five years. In the beginning the treatment would be weekly for about two months and then after that monthly. The minimum time would be three years. The cost, he said, would be $10.00 per treatment, including medication.

Dr. Eugene Clark, a specialist in heart and cardiovascular matters, testified that he examined the plaintiff on October 30, 1957 and on April 27, 1960. He also made X-rays, cardiographs, took blood tests and made a urine analysis. He said the aneurysm was the size of a fist and would have required a development of ten years before December 1954 and that the cause of this aneurysm was syphilis. He also said that the ordinary pre-sign-on examination would not have revealed the aneurysm; that a chest X-ray was required to discover this.

Dr. Clark testified that there was no indication at the time of the Hudson & Jay Street Hospital clinical records, December 20, 1954 to January 6, 1955, or the Marine Hospital record or on his examination of October 30, 1957 or on his last examination on April 27, 1960 that the plaintiff was suffering from congestive heart failure.

Dr. Hyman Arenberg, who is a specialist in internal medicine and cardiology, testified for the plaintiff.

Dr. Arenberg said that he had examined plaintiff on June 23, 1960 and that, in his opinion, plaintiff was now suffering from congestive heart failure; that he has an aneurysm of the arch of the aorta of long standing.

The doctor testified that treatment of the plaintiff should be administered to diminish the fluid in his body

in order to decrease the size of the heart, diminish the congestion in the lungs and diminish the extent of the peripheral edema that plaintiff has in his legs. This treatment, accompanied by a low sodium diet and the loss of 25 or 30 pounds and with the taking of digitalis to reduce the heart rate and to give a greater efficiency of cardiac contraction, along with diuretics, would improve the plaintiff considerably. He might then be able to work as a watchman, although not to go back as a seaman. The minimum time of such treatment would be six months. The doctor was not too definite about the cost, although there was some indication that this would involve two treatments a week at about $3.00, or perhaps a total of $100.00.

The Court of Appeals for this circuit has recently commented on a seaman's right to maintenance and cure as follows:

> " '[T]he vitality of a seaman's right to maintenance and cure has not diminished through the years.' Mitchell v. Trawler Racer, Inc., supra, at —— [28 U. S. L. Week 4293, decided May 17, 1960]. It has become established that the obligation of the shipowner attaches as a result of the relationship of employment without any regard for the form of the contract or the will of the contracting parties. Cortes v. Baltimore Insular Line, 1932, 287 U. S. 367, 372. The rights of the seaman are neither conditioned on fault on the part of the shipowner nor on the absence of fault on his part. Farrell v. United States, 1949, 336 U. S. 511. Nor must the injury or illness be in any way causally connected with shipboard duties. Farrell v. United States, supra. The obligation to provide maintenance and cure has been expanded so far that two of the foremost admiralty scholars have concluded that 'With

> the exception of borderline cases on misconduct • • • [t]he remedy has become absolute.' Gilmore and Black, The Law of Admiralty (1957) 261." Bartholomew v. Universe Tankships, Inc., 2 Cir., No. 25989, decided June 21, 1960.

Of course, this responsibility of the shipowner to provide maintenance and cure extends only until the point of maximum recovery. Salmar SS Corp. v. Taylor, 1938, 303 U. S. 525; Farrell v. United States, 1949, 336 U. S. 511.

As with other well-defined rules of law, difficulties arise in the application to a given factual situation. The problem present here stems from the fact that the plaintiff has two distinct physical disabilities.

As heretofore found, the heart condition pre-existed employment and did not manifest itself during the employment. The responsibility anciently imposed upon a shipowner for the health and security of sailors was liability for the maintenance and cure of seamen *becoming ill or injured* during the period of their service. See Aguilar v. Standard Oil Co., 1942, 318 U. S. 724, 730, including Note 6, p. 730.

Cases cited by the plaintiff are not applicable. They involve situations where a pre-existing condition either becomes aggravated or manifests itself during service on the vessel or are cases based upon a ship-incurred ailment. See Ahmed v. United States, 2 Cir., 1949, 177 F. 2d 898; United States v. Robinson, 5 Cir., 1949, 170 F. 2d 578; Hern v. Moran Towing and Transportation Co., 2 Cir., 1943, 138 F. 2d 900; Rey v. Colonial Nav. Co., 2 Cir., 1941, 116 F. 2d 580; Lindgren v. Shepard S.S. Co., 2 Cir., 1940, 108 F. 2d 806.

In any event, I am convinced that the heart condition was incurable on March 1, 1955 when the plaintiff was discharged from the Marine Hospital. When meaningful hopes for recovery end, the shipowner's liability ends.

If the disease is incurable the shipowner has no further liability even though the patient may require additional treatment to restrain degeneracy or relieve pain. Desmond v. United States, 2 Cir., 1954, 217 F. 2d 948.

I am impressed by the testimony of Dr. Eugene Clark, who examined the plaintiff on October 30, 1957 and on April 27, 1960 and examined the records of the Marine Hospital. Dr. Clark found no indication of a congestive heart failure. The "compensation" treatment described by Dr. Spindler would not improve the essential heart condition of the plaintiff—the enlargement of the cardiac vessels.

The back condition of the plaintiff—the herniation of the nucleus pulposus—arose while plaintiff was in the service of defendant's vessel. The shipowner was obligated to furnish maintenance and cure until such time as the disease was cured or recognized as incurable. This duty does not extend beyond a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing care and medical treatment. Calmar SS Corp. v. Taylor, 1938, 303 U. S. 525, 530.

In this case, the aneurysm of the aorta due to arteriosclerosis made surgical intervention to cure the herniation of the nucleus pulposus impossible. When the plaintiff was released from the Marine Hospital on March 1, 1955 maximum hospital benefit was indicated. It is the contention of the plaintiff that conservative treatment should have been given which would have rehabilitated from to a point where he could have obtained sedentary employment. At issue, therefore, is the meaning of the word "cure."

In The Bouker No. 2, 2 Cir., 1917, 241 Fed. 831, 835, "cure" was defined as follows:

> "• • • We agree with the remark in The Mars, supra [149 Fed. 729, 79 C. C. A. 435 (C. C. A. 3d)], that:

> " 'The word "cure" is used in its original meaning of care, and means proper care of the injured seaman, and not a positive cure, which may be impossible.'
>
> "Furthermore, 'cure' has been held to signify:
>
> " 'The ordinary medical assistance and treatment in case of injury or acute disease, for a reasonable time. The ship is not bound to pay for (the sailor's) medication for the cure of a chronic disorder for an indefinite length of time.' The Ella S. Thayer (D. C.) 40 Fed. 904.
>
> "Nor does the liability of the ship extend beyond —'expense of effecting a cure by ordinary medical means. This does not include extraordinary medical treatment or treatment after cure effected as completely as possible in a particular case.' The C. S. Holmes, supra [(D. C.) 209 Fed. 970]."

In Carlsson v. United States, 2 Cir., 1958, 252 F. 2d 352, the court noted that the right to maintenance and cure may continue to exist until maximum *rehabilitation* has been obtained. However, in Buch v. United States, 2 Cir., 1955, 220 F. 2d 165, an award based upon rehabilitation program was reversed when the Appellate Court found insufficient evidence to demonstrate the curative nature of the treatment. The curative nature of the treatment was also emphasized in Bradt v. United States, 2 Cir., 1955, 221 F. 2d 325.

Maximum cure is reached when no further improvement in the seaman's condition is to be expected. Wilson v. United States, 2 Cir., 1956, 229 F. 2d 277; Koslusky v. United States, 2 Cir., 1953, 208 F. 2d 957.

No further improvement in plaintiff's back condition could have resulted from any treatment after March 1, 1955. The treatment described by Dr. Mauer is not of a sufficiently

curative nature to be classified as cure. Dr. Mauer's conservative treatment consists of the wearing of a brace, physiotherapy and vitamin B-12 injections. This treatment appears to be in the nature of an attempt to restrain degeneracy or relieve pain rather than curative. See Desmond v. United States, 2 Cir., 1954, 217 F. 2d 948.

In addition, Dr. Mauer examined the plaintiff on May 2, 1960. It is not unreasonable to assume that some of the conditions found on that date, namely the general weakness and the atrophy of the left thigh and left calf, were directly related to the five years spent in inactivity without medical care since March 1, 1955. There is no assurance that the so-called "conservative treatment," which in essence is exercise and the wearing of a brace, was indicated by his condition on March 1, 1955.

Dr. Balensweig, who examined the plaintiff on June 25, 1956 and who examined the hospital records at that time, was of the opinion that the plaintiff had reached maximum cure at the time of the discharge from the hospital.

There is no evidence here that subsequent to March 1, 1955 the plaintiff ever sought medical treatment or incurred medical expense. See Carlsson v. United States, 2 Cir., 1958, 252 F. 2d 352, 353. This is not to indicate that this failure to seek medical attention would warrant a forfeiture of his right to maintenance and cure. See Gardner v. Sinclair Refining Co., 3 Cir., 1955, 227 F. 2d 958.

But the failure of the plaintiff to seek such relatively simple treatment for over five years raises doubt as to the validity of the proposed cure. See Buch v. United States, 2 Cir., 1955, 220 F. 2d 165, wherein the court stated: "Since the libelant has shown no inclination to date to undertake this program, we cannot say that its curative nature was sufficiently demonstrated" (p. 166).

The plaintiff reached maximum cure on March 1, 1955 when all meaningful hopes for recovery ended and no fur-

ther improvement in his condition could be expected. He is entitled to maintenance from December 15, 1954 to January 12, 1955 in the amount of $224, plus interest as hereinafter designated.

Conclusions of Law

1. This court has jurisdiction of the parties and of the subject matter of this action.

2. The defendant has the duty to provide maintenance and cure to any seaman injured or falling ill in the service of the ship.

3. The plaintiff suffered a back injury while in the service of the ship and also suffered from a cardio-vascular condition.

4. The plaintiff reached the point of maximum recovery for both disabilities on March 1, 1955, the date of his discharge from the United States Public Health Service Hospital at Stapleton, Staten Island, New York and no further improvement in his condition could be expected after that date.

5. The plaintiff is entitled to recover maintenance and cure at the rate of $8.00 per day from December 15, 1954, the date of the termination of the voyage of defendant's vessel, to January 12, 1955, the date of his admission to the United States Public Health Service Hospital, a total of 28 days, for a total amount of $224, plus interest on each day's allowance, such interest on each day's allowance to be computed for the period commencing on such day and running to the date of actual payment.

Final Judgment of District Court

Let a decree be entered in accordance herewith in favor of the libellant for the sum of $224 with interest on each day's allowance, such interest on each day's allowance to be computed for the period commencing on such day and running to the date of actual payment.

Dated: New York, N. Y., June 29, 1960.

RICHARD H. LEVET,
United States District Judge.

Final Judgment of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The above entitled action having come on for trial before Honorable Richard H. Levet and a jury, and the issues with respect to plaintiff's claim for maintenance and cure reserved for trial by the Court without a jury, and the third party complaint having been dismissed at the close of the evidence in the jury trial by consent, without costs, and the jury having rendered a special verdict with respect to plaintiff's claims for negligence and unseaworthiness in answer to special interrogatories, as follows:

SPECIAL VERDICT

1. Was the order of the defendant, under all the facts and circumstances thereof, to bring the drum

of cement up the gangway on November 5, 1954 a negligent order? No.

2. Was the SS American Reporter unseaworthy? No.

If your answer to either No. 1 or No. 2 is in the affirmative, answer No. 3. If they are in the negative, your verdict is for the defendant.

3. Was the plaintiff injured either as a result of obedience to said order or the unseaworthiness of the vessel?

4. (a) If your answers to either No. 1 and No. 3 or No. 2 and No. 3 are in the affirmative, to what award, if any, is the plaintiff entitled for pain, suffering and disability from the date of the accident to the present time as a result of injuries referred to in No. 3?

(b) To what award, if any, is the plaintiff entitled for lost earnings from December 15, 1954 to the present time as a result of injuries referred to in No. 3?

Note: The net earnings after taxes of the plaintiff are to be considered here.

(c) To what award, if any, is the plaintiff entitled for pain, suffering and disability which he allegedly will endure in the future as a result of the injuries referred to in No. 3 and for any future reasonable medical expenses which he will incur as a result of the injuries referred to in No. 3?

(d) For how many years from today forward do you estimate that plaintiff would have been able to work but for the injuries referred to in No. 3 and despite other physical handicaps?

(e) What, if anything, is the annual amount of wages which plaintiff would have earned from today forward but for the injuries referred to in No. 3 and despite other physical handicaps?

Note: The net earnings after taxes of the plaintiff are to be considered here.

(f) What, if anything, is the annual amount of future wages which plaintiff may reasonably be expected to earn from today forward despite the injuries referred to in No. 3 and despite other physical conditions from which he may suffer?

(g) Deducting the sum arrived at in answer to (f) above from the sum arrived at in answer to (e) above, what, if anything, is the annual amount of earnings which will be lost to plaintiff in future years as a result of the injuries referred to in No. 3?

5. If your answers to either No. 1 and No. 3 or No. 2 and No. 3 are in the affirmative, did the plaintiff by any negligent conduct contribute in any degree to the injuries referred to in No. 3?

6. If your answer to No. 5 is in the affirmative, to what extent did plaintiff's negligent conduct so contribute to the injuries referred to in No. 3?

Note: In answering this question state your answer as a percentage.

And the Court having directed judgment with respect to the said claims for negligence and unseaworthiness in accordance with said special verdict

And the Court having filed its opinion, findings of fact and conclusions of law with respect to plaintiff's claim for

maintenance and cure, dated June 29, 1960, granting judgment for the plaintiff in the sum of $224 with interest on each day's allowance, such interest on each day's allowance to be computed for the period commencing on such day and running to the date of actual payment, it is

ORDERED AND ADJUDGED that plaintiff's claims for personal injuries based upon negligence and unseaworthiness, be and are hereby dismissed, with prejudice, and without costs, and it is further

ORDERED AND ADJUDGED that plaintiff recover of and from the defendant, for maintenance and cure, the sum of $224 with interest on each day's allowance, such interest on each day's allowance to be computed for the period commencing on such day and running to the date of actual payment, without costs, and it is further

ORDERED AND ADJUDGED that the third party complaint be dismissed, without costs.

Dated: New York, New York, August 30, 1960.

RICHARD H. LEVET,
U. S. D. J.

Rec'd in Clerk's office 9/6/60

JUDGMENT ENTERED this 6th day of September, 1960.

HERBERT A. CHARLSON,
Clerk.

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 194—September Term, 1961

(Argued January 12, 1962 Decided June 29, 1962)

Docket No. 26716

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MARTIN, deceased,

Plaintiff-Appellant,

v.

UNITED STATES LINES COMPANY,

Defendant.

Before:

LUMBARD, *Chief Judge*,

CLARK, WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS and MARSHALL, *Circuit Judges*.

Appeal from a judgment of the District Court for the Southern District of New York, Richard H. Levet, *Judge*, in a seaman's action for damages under the Jones Act and for maintenance and cure, dismissing the Jones Act claim on the basis of a special verdict negating negligence and unseaworthiness, and awarding $224 for maintenance and cure. Affirmed.

THEODORE H. FRIEDMAN (Benjamin Glickman, Jacob Rassner), New York, New York, for Plaintiff-Appellant.

MATTHEW L. DANAHAR (Kirlin, Campbell & Keating), New York, New York (John A. Dowd of Counsel), for Defendant.

FRIENDLY, *Circuit Judge*:

This action against United States Lines Company, begun in the Southern District of New York by Andres San Martin, a seaman employed on defendant's vessel, the SS. American Reporter, has been continued, on his death after trial, by the Public Administrator of New York County. The complaint, filed in 1955 and brought to trial in 1960, alleged two causes of action. The first, relying specifically upon the Jones Act, 46 U. S. C. § 688, asserted that by reason of the unseaworthiness of the American Reporter and defendant's negligence, plaintiff had been caused to twist and strain his back while assigned to carry barrels of cement up the ship's gangway on November 6, 1954, and that defendant was further negligent "in failing to provide the plaintiff with timely, adequate, proper and competent medical care and attention and maintenance and cure, thereby aggravating his condition", with total damages of $75,000. The second was for maintenance and cure in the sum of $10,000.

Plaintiff's citizenship was not alleged. Defendant was alleged to be, in paragraph First, "a domestic corporation organized and existing under and by virtue of the Laws of the State of New York" and, in paragraph Second, "a foreign corporation duly licensed to do business within the State of New York." Paragraph Third alleged that "the defendant had an office for the transaction of business in

the Borough of Manhattan, City and State of New York." Compliance with F. R. Civ. Proc. 8(a)(1), demanding "a short and plain statement of the grounds upon which the court's jurisdiction depends", was evidently intended to be met by paragraph Ninth: "Plaintiff elects to maintain this action under the provisions of Section 33 of the Merchant Seamen's Act as of June 15, 1920, C. 250 41 Stat. 1007 otherwise known as the Jones Act." There was endorsed on the complaint "Plaintiff Demands a Jury Trial." In its answer defendant denied being a New York corporation and admitted being a foreign corporation and having a New York office.

Before a jury was chosen, Judge Levet directed that the claim for maintenance and cure be tried to the court only; counsel for plaintiff excepted. On the following morning, discussion of this was resumed in the robing room before the taking of testimony began. Plaintiff's counsel stated that jury trial of maintenance and cure "is a matter of choice for the District Court", and also that "The plaintiff is entitled to a jury on this action which is properly before this Court on a common-law basis"—without further amplification save for reference to "the authority of Jenkins v. Walker" [presumably *Jenkins* v. *Roderick*, 156 F. Supp. 299 (D. Mass. 1957)], and "the discussion of that case by the Supreme Court in Romero v. International Terminal." The judge adhered to his ruling "that in this court, in the Second Circuit, it is permissible and authorized to try maintenance and cure to the Court."

At the conclusion of the trial Judge Levit submitted to the jury six questions, relating respectively to negligence, unseaworthiness, resulting injury, amount of damages, contributory negligence, and its degree. The jury gave negative answers to the first two questions; consequently, in accordance with the judge's direction, it did not answer the last four. Appellant makes no complaint as to the form of the questions or the judge's charge; he does complain

about certain rulings excluding evidence, which we will consider below.

In an opinion later filed, the judge found that San Martin had incurred a back injury while in the service of the ship and also suffered from a cardio-vascular condition due in part to untreated syphilis; that he had reached the point of maximum recovery for both disabilities on March 1, 1955, when he was discharged from a United States Public Health Service Hospital; and that liability for maintenance and cure was thus limited to the period, 28 days, before he entered the hospital, to wit, $224. Although appellant criticizes the judge's determination with respect to maintenance and cure, his principal complaint on that aspect of the case is that the judge should not have made any determination but ought to have left the issue to the jury; as to the criticisms apart from this principal complaint, it suffices to say that the judge's determination was not in any view clearly erroneous.

Because the analysis of the right to jury trial of the claim for maintenance and cure made by a majority of the panel conflicted with a recent dictum on the subject by this Court, see Mr. Justice Frankfurter in *Western Pacific Railroad* case, 345 U. S. 247, 270 (1953), and also because the problem constantly recurs in the district courts, we determined that the case should be considered *in banc*, upon the briefs and argument already had. This consideration has produced a variety of views, with none commanding a majority. It will thus be convenient to dispose of the issues relating to the trial of the personal injury claim, which none of us would have thought appropriate for *in banc* consideration if standing alone, before proceeding to the question of jury trial of the claim for maintenance and cure.

I.

Certain of appellant's objections to rulings excluding evidence on his personal injury claim, relating to San Martin's explanation of his failure to make earlier complaint about his injury, his colloquy with physicians at the Public Health Service clinics and hospital, and a report by a physician who testified for him, are rendered moot by the special verdict negating unseaworthiness or negligence; we need concern ourselves only with the exclusion of evidence relating to the accident itself.

Appellant complains that San Martin was not allowed, on direct examination, to testify that he had objected to carrying the two heavy barrels of cement up the gangway. Although we can see no sufficient reason for this ruling, it was not prejudicial since counsel returned to the subject on redirect and, without objection, elicited testimony that San Martin had told his boss, Manzo, the mission was "too dangerous" and the boss had answered "You have to do anyway." Appellant next urges that San Martin was not allowed to testify why he moved from side to side while ascending the gangway. Again the ruling seems needlessly severe but not, as matters developed, prejudicial. The evident purpose of the testimony was to show the gangway was unstable. San Martin was allowed to testify that he moved and that the gangway moved; the physical layout of the gangway was in evidence; and the judge stated in his charge, without exception from plaintiff's counsel, "As appears by the stipulation read to you this morning, it is agreed that the nature and position of the gangway does not enter into the disposition of this case."

Finally, and most important, appellant objects that one of San Martin's fellow-employees, Murrell, was not allowed to answer a question as to conversations with Manzo about bringing aboard engine stores within a month before the accident, even after it had been shown that the weights

of the stores on the prior occasion were less than the 100 pounds San Martin was ordered to carry on the day of the alleged injury. When the judge inquired as to the pertinency of this testimony, counsel answered, not very informatively, "Prior and similar loading procedure," to which the court responded "It is too remote." Assuming in appellant's favor, perhaps somewhat generously, that counsel's remark was an offer to prove that Murrell had complained to Manzo about the manual loading of lesser weights, the evidence should have been admitted. Knowledge of danger is relevant to a determination of negligence, the *Nitro-Glycerin* case, 82 U. S. (15 Wall.) 524, 536-537 (1873), and evidence that such knowledge was gained through an express communication is admissible. 2 Wigmore, Evidence (3d ed. 1940) § 245; *New York Life Ins. Co.* v. *Seighman*, 140 F. 2d 930, 932-933 (6 Cir. 1944); *Evans* v. *Pennsylvania R.R.*, 255 F. 2d 205, 209-210 (3 Cir. 1958); *Smith* v. *Whittier*, 95 Cal. 279, 30 Pac. 529 (1892); *Jenkins* v. *Reichert*, 125 Conn. 258, 5 A. 2d 6 (1939); *Dowling* v. *L. H. Shattuck, Inc.*, 91 N. H. 234, 17 A. 2d 529 (1941); *Killian* v. *Andrews Mfg. Co.*, 187 N. C. 810, 123 S. E. 86 (1924). However, the probative effect of the excluded evidence would not have been great. The case differs significantly from those cited where the dangers were defects in machinery or property, things which the defendant might not notice on his own inspection and, in many instances, so technical that he might not appreciate the danger if he did; in such cases proof of notice is highly critical since there may be no basis for finding the defendant negligent without it. Here the issue related to the safety of the carrying of certain weights by men rather than machines. The jury had the evidence of experts called by both parties, San Martin's own testimony he had told Manzo the procedure was "too dangerous," and its own common sense; if the jury was not persuaded of negligence on that evidence, it hardly would have been by the addition of testimony that

a fellow employee had complained about the procedure on a previous occasion. In *Dowling* v. *L. H. Shattuck, Inc., supra,* where the evidence of a prior communication, held properly admitted, was far more important, the court implied that the trial judge would also have been upheld if he had excluded it. In view of this and the recognized discretion of trial judges to exclude for remoteness, see, e.g., *Duvall* v. *Birden,* 124 Conn. 43, 198 Atl. 255 (1938); *Hutteball* v. *Montgomery,* 187 Wash. 516, 60 P. 2d 679 (1936), reversal with respect to the personal injury claim is not called for, even though a more liberal concept of relevancy would have conformed better with modern trends in the law of evidence.

II.

We can also unanimously dispose of one argument of appellant with respect to the denial of jury trial, namely, that the judge erroneously reserved for himself plaintiff's claim for damages from negligent failure to furnish care or maintenance and cure. Appellee does not dispute that such a claim is conferred by the Jones Act, with the attendant right to trial by jury, *Cortes* v. *Baltimore Insular Line, Inc.,* 287 U. S. 367 (1932); *Vaughan* v. *Atkinson,* — U. S. — (1962). However, although the complaint alleged such a claim, no evidence was adduced to support it, and plaintiff's counsel made no request that any question on this subject be included in those propounded to the jury. We cannot assume the judge would have refused to submit such a question if the evidence had warranted.

III.

Appellant's contention that San Martin was entitled to a jury trial on his claim for maintenance and cure rests on two alternative grounds: (1) that San Martin had invoked the court's diversity of citizenship jurisdiction, 28 U. S. C. § 1332; and (2) that he was entitled to a jury trial irrespective of this because his claim for maintenance and cure was "pendent" to his claim under the Jones Act. This section of the opinion deals with the first ground.

There are many statements by commentators that a seaman properly invoking the jurisdiction of the district court because of diverse citizenship has a right to a jury trial of a claim for maintenance and cure, whether this is asserted independently or joined with other claims. See, e.g., Benedict, American Admiralty (1st ed. 1850 & 2d ed. 1870), p. 107; 1 *id.* (6th ed. 1940), p. 36; 5 Moore, Federal Practice (1951), p. 284; 71 Harv. L. Rev. 1359, 1360 (1958); Currie, The Silver Oar and All That: A Study of the Romero Case, 27 U. Chi. L. Rev. 1, 5 (1959);[1] The Supreme Court, 1958 Term, 73 Harv. L. Rev. 126, 139 (1959). The reasoning stems from § 9 of the Judiciary Act of 1789, 1 Stat. 77, carried forward into 28 U. S. C. § 1333(1), wherein the grant to the district courts of "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" was qualified with the famous reservation, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." The common law is competent to give a common law remedy for breach of the obligation, created by the general maritime law, to pay

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[1] Subject, however, to a *caveat*. "Congress *probably* intended that if he sued in the federal court (as he might if there were diversity of citizenship) he should have the right to a jury trial." [Emphasis supplied.] Perhaps the "*probably*" was due to the considerations outlined in fn. 6.

maintenance and cure, namely, a money judgment against the operator of the ship. The saving clause thus permits a suit to that end in a state court, where jury trial may usually be had, see *Leon* v. *Galceran*, 78 U. S. (11 Wall.) 185 (1871); *Norton* v. *Switzer*, 93 U. S. 355, 356 (1876); *Garrett* v. *Moore-McCormack Co., Inc.*, 317 U. S. 239 (1942). Hence, it is reasoned, if such a suit were removed to the Federal court because of diversity or brought there on that ground, the saving clause requires jury trial.

In view of the plausibility of the argument and the unanimity of the commentators, it is surprising that the first case we have found that specifically decided in favor of a jury trial in a Federal diversity suit on a maritime claim (in that case personal injury caused by unseaworthiness) is *Philadelphia & Reading R. Co.* v. *Berg*, 274 F. 534, 539 (3 Cir. 1921), affirming 266 F. 591 (E. D. Pa. 1920),[3] cert. denied, 257 U. S. 638 (1921). The Court of Appeals noted that "The Supreme Court of the United States has not passed upon this specific question, but the right to try on the law site [sic] of the District Court a cause arising in admiralty has been recognized in the Circuit Court of Appeals for the Second Circuit," citing *John A. Roebling's Sons Co.* v. *Erickson*, 261 F. 986 (2 Cir. 1919), cert. denied, 252 U. S. 585 (1920); *Hanrahan* v. *Pacific Transport Co.*, 262 F. 951 (2 Cir. 1919), cert. denied, 252 U. S. 579 (1920), and *Storgard* v. *France & Canada S.S. Corp.*, 263 F. 545 (2 Cir.), cert. denied, 252 U. S. 585 (1920). Examination of the papers on appeal in those suits, all for accidents antedating the Jones Act, shows that diversity did exist and martime claims (unseaworthiness in all three cases and also maintenance and cure in the first) were submitted to the jury; however, such submission was not disputed,

[3] The accident quite clearly antedated the Jones Act, which became effective June 5, 1920, 41 Stat. 1007.

and the point is not discussed.[3] Since the *Berg* case a considerable number of opinions have recognized, either by dictum or by decision, the right to jury trial of a claim for maintenance and cure and other maritime claims of seamen filed on the "law side" of the Federal court on the ground of diversity; *Thornes v. Socony Vacuum Oil Co.*, 38 F. Supp. 616 (S. D. N. Y. 1940); *McDonald* v. *Cape Cod Trawling Corp.*, 71 F. Supp. 888, 890 (D. Mass. 1947) [dictum]; *Jordine* v. *Walling*, 185 F. 2d 662, 671 (3 Cir. 1950) [dictum]; *Watlack* v. *North Atlantic & Gulf SS. Co., Inc.*, 107 F. Supp. 162 (E. D. Pa. 1952), aff'd, 202 F. 2d 280 (3 Cir. 1953); *Williams* v. *Tide Water Associated Oil Co.*, 227 F. 2d 791 (9 Cir. 1955), cert. denied, 350 U. S. 960 (1956); *Troupe* v. *Chicago, D. and G. Bay Transit Co.*, 234 F. 2d 253, 258 (2 Cir. 1956); *Morrow* v. *Point Towing Co.*, 187 F. Supp. 168 (W. D. Pa. 1960).[4] See also *McAfoos* v. *Canadian Pacific Steamships, Ltd.*, 243 F. 2d 270, 274 (2 Cir.), cert. denied, 355 U. S. 823 (1957); *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437, 451 (2 Cir.) (concurring opinion), cert. denied, 359 U. S. 1000 (1959).[5]

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[3] The Third Circuit's citation of the Second Circuit cases was likely due to the fact that plaintiff's counsel in all four cases was the late Silas B. Axtell.

[4] Some of the cases suggest that to entitle a diversity plaintiff to a jury trial of a maritime claim joined with a claim at law, the maritime claim alone must satisfy the jurisdictional amount, see *Morrow* v. *Point Towing Co.*, 187 F. Supp. at 169. Normally aggregation for this purpose of claims properly joined is allowed, see 3 Moore, Federal Practice (2d ed. 1948), p. 1815 and cases cited note 5, also 1961 supplement pp. 160-161 and cases cited note 5.

[5] It may also be said with much force that statements by the Supreme Court that where diversity exists, a plaintiff may have an action "at law" in the Federal courts to enforce a maritime claim, see *The Belfast*, 74 U. S. (7 Wall.) 624, 643 (1869); *Leon* v. *Galceran*, 78 U. S. (11 Wall.) 188; *Steamboat Company* v. *Chase*, 83 U. S. (16 Wall.) 522, 533 (1873); *Norton* v. *Switzer*, 93 U. S. at 356; and *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 362 (1959), implicitly included that characteristic feature of an action at law, namely, a jury trial, even though no specific reference to that was made. See also *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 628 (1959).

In any event, despite a dubious "archeological" argument, see *Romero* v. *International Terminal Operating Co., Inc.*, 358 U. S. 354, 370 (1959), that might have been made from other language in the Act of 1789, an argument which, as a matter of possible interest to historians, we state and refute in the margin,[*] the point has now been placed beyond

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[*] Section 9 of the First Judiciary Act, which gave the district courts, *inter alia*, "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction," subject to the saving clause, provided that "the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury." Since the admiralty and maritime jurisdiction of the district courts under § 9 extended only to "traditional" admiralty causes, such as proceedings *in rem* and suits *in personam* where the complaining party chose to call himself a libelant rather than a plaintiff, *Leon* v. *Galceran*, 78 U. S. (11 Wall.) at 188; Mr. Justice Brennan dissenting in *Romero* v. *International Terminal Operating Co.*, 358 U. S. at 396, the last quoted provision in § 9 would not itself weigh against the view that jury trial could be had in a suit on the "law side" where diversity existed. However, § 12 of the Act of 1789 provided that in the circuit courts, in which diversity jurisdiction had been lodged, "the trial of issues in fact * * * shall, on all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury," and § 19 made it "the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record either from the pleadings and decree itself, or a statement of the case agreed by the parties, or their counsel, or if they disagree by a stating of the case by the court." Since the only suits of admiralty and maritime jurisdiction that could be brought on for initial trial in the circuit courts seem to have been those under the saving clause, notably cases of diverse citizenship, either originally, § 11, or on removal, § 12, it could be argued that the language of § 12 excluding jury trial of issues of fact in admiralty and maritime matters, and of § 19 requiring the court to find the facts in such cases, would have had no purpose unless it covered suits under the saving clause where the source of the right lay in general maritime law.

The answer, perhaps not a wholly satisfactory one, is that the language of §§ 12 and 19 of the Act of 1789 as to admiralty and maritime matters related rather to appeals to the circuit courts "from

all doubt by language in a recent Supreme Court decision, *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, — U. S. — (1962).

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final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars," authorized by § 21, wherein, in accordance with traditional admiralty practice evidence could be taken, see, e.g., *Yeaton* v. *United States*, 9 U. S. (5 Cranch) 281 (1809); *The Lucille*, 86 U. S. (19 Wall.) 73 (1874); *The Charles Morgan*, 115 U. S. 69 (1885); *Irvine* v. *The Hesper*, 122 U. S. 256 (1887). This view gains some support from § 1 of the Act of February 16, 1875, 18 Stat. 315, which provided "That the circuit courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance-side of the court, shall find the facts and the conclusions of law upon which it renders its judgment or decrees, and shall state the facts and conclusions of law separately"—substantially as stated in § 19 of the Act of 1789– and then went on "And in finding the facts, as before provided, said court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue * * * impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such cause, under the direction of the court, as in cases at common law. And the finding of such jury, unless set aside for lawful cause, shall be entered of record, and stand as the finding of the court, upon which judgment shall be entered according to law." See *The Abbotsford*, 98 U. S. 440 (1879). Benedict, American Admiralty (3d ed. 1900), p. 104, says that this statute was intended to deal with appeals to the circuit court but that the author had never heard of a case where a jury had been used. See also notes to 28 U. S. C. § 771 (1940 ed.) and *Munson SS. Line* v. *Miramar SS. Co.*, 167 F. 960 (2 Cir.), cert. denied, 214 U. S. 526 (1909).

In addition to this explanation, it seems most unlikely that, with the enthusiasm of the founders for jury trial and their adoption of Coke's "enmity" of admiralty jurisdiction (see Buller, J., in *Smart* v. *Wolff*, 3 T. R. 323, 348, 100 Eng. Regp. 600, 613 (1789); 1 Holdsworth, History of English Law (3 ed. 1922), pp. 556-557; the resolution of the Massachusetts legislature quoted in 1 Holdsworth at p. 558 fn. 2; and the concurring opinion of Mr. Justice Johnson in *Ramsay* v. *Allegre*, 25 U. S. (12 Wheat.) 611, 614 (1827), the framers of the First Judiciary Act could have meant to permit an out-state defendant sued by an in-state plaintiff on a maritime claim in a state court to prevent, by removal to the circuit court, a jury trial

However, recognition of this rule does not call for reversal here. When the issue of jury trial arose, the judge had nothing before him save the pleadings. The complaint, on which the jury demand was endorsed, gave no indication of reliance on diversity; the pleader was so little concerned with that subject that he made no allegation of plaintiff's citizenship and alleged that defendant both was and wasn't a citizen of New York, although with an office there. No one called the judge's attention to the answer's disclaimer of defendant's New York citizenship—along with an admission of a New York office, which under the law applicable to suits brought after July 25, 1958, might well have negated diversity if plaintiff were a New York Citizen, 28 U. S. C. § 1332(c). Neither the judge nor, so far as we can see, anyone else then had any idea that Federal jurisdiction was being invoked on any basis other than the Jones Act, or that jury trial of the claim for maintenance and cure was being claimed on any basis other than "pendency" to it —"pendency" was the point of the authorities cited. Counsel's single reference to a "common-law basis" was quite insufficient to apprise the judge of a theory of diversity nowhere disclosed.

Later, in the course of testifying on the merits, San Martin said he had been born in Spain in 1897, had come to the United States in 1915, had joined the American Reporter in New York in 1953, and had lived in New York since

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the plaintiff could otherwise have had or to deprive the in-state defendant sued by the out-state plaintiff in the circuit court of such a trial.

The provisions of the First Judiciary Act here discussed remained in the statute book, save as modified by 5 Stat. 726 (1845), now 28 U. S. C. § 1873, with respect to shipping upon the Great Lakes, until 1948, see Rev. Stat. §§ 566 and 648; Act of March 3, 1875, § 3, Stat. 471; Judicial Code of 1911, § 291, 36 Stat. 1167; 28 U. S. C. § 770 (1940 ed.). The repeal was on the explicit ground that the subject was "covered by rule 38 of the Federal Rules of Civil Procedure," see Reviser's Note to 28 U. S. C. § 1873.

his discharge from the Public Health Hospital in 1955. This, appellant says, shows that San Martin was a citizen either of Spain or of New York, so that diversity in fact existed. This was enough so that if the judge had altered his prior ruling and sent the maintenance and cure claim to the jury, we would affirm, since submission to the jury would have been proper on the facts as they later appeared, and we would conform the pleading to the proof, *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 234 F. 2d 253, 257-258 (2 Cir. 1956); see *Brooks* v. *Yawkey*, 200 F. 2d 663, 664 (1 Cir. 1953). However, counsel did not suggest to the judge that San Martin's statements, made in the course of testifying generally, called for reconsideration of his earlier rulings as to jury trial. We cannot properly direct a busy District Court to retry San Martin's claim for maintenance and cure before a jury, after a fair trial before a judge, on a ground for jury trial not disclosed in the complaint and never brought to the judge's attention after it appeared.

IV.

We thus come to appellant's alternative contention that, even if diversity was not sufficiently made out to render the denial of a jury trial of the claim for maintenance and cure erroneous on that score, San Martin was entitled to such a trial of that claim on the basis of "pendent jurisdiction." In contrast to the argument based on diversity, this contention was raised below with sufficient clarity to require us to consider a question the Supreme Court left open in *Romero*, 358 U. S. at 381, namely, whether in a non-diversity case where a substantial claim has been asserted under the Jones Act, the District Court may and, if so, ought submit to the jury for final determination a claim for maintenance and cure which has been joined with it. On this we are divided. Chief Judge Lumbard, Judges Moore and Kaufman and I, for whom the balance of this opinion speaks, answer the first half of the question in the nega-

tive and do not reach the second; Judges Waterman and Smith, concurring for affirmance, differ with us in holding that in such a case the judge has discretion so to submit to the jury a claim for maintenance and cure arising out of the same event as the Jones Act claim; Judges Clark, Hays and Marshall believe jury trial of the joined claim for maintenance and cure was here required.

(1) By explicit statutory direction an action under the Jones Act is "an action for damages at law with the right of trial by jury," 46 U. S. C. § 688. As "an action * * * at law," it is governed by the Federal Rules of Civil Procedure, F. R. Civ. Proc. 1, despite the inapplicability of those rules "to proceedings in admiralty," F. R. Civ. Proc. 81(a)(1). A claim for maintenance and cure may properely be joined in such an action under the broad language of F. R. Civ. Proc. 18(a). We say this even though the claim is founded on the maritime law and the rule refers to the joinder of "claims either legal or equitable or both," words which we read as inserted, *ex majore cautela*, to prevent future judicial adherence to traditional distinctions against the joinder of legal and equitable claims, not to prohibit the joinder of claims under maritime law which the courts already permitted.[7]

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[7] See *Stevens* v. *R. O'Brien & Co.*, 62 F. 2d 632, 633 (1 Cir. 1933). Such joinder continued to be upheld in the First Circuit after adoption of the Federal Rules, *Nolan* v. *General Seafoods Corp.*, 112 F. 2d 515, 517 (1940); *Bay State Dredging & Contracting Co.* v. *Porter*, 153 F. 2d 827 (1946), both antedating the First Circuit's position, *Jansson* v. *Swedish American Line*, 185 F. 2d 212, 217-218 (1950) and *Doucette* v. *Vincent*, 194 F. 2d 834, 836 (1952), with respect to the effect of 28 U. S. C. § 1331 overruled in the *Romero* case. Footnote 5 to Chief Judge Magruder's opinion in the *Doucette* case states that diversity was not alleged in any of these three cases and that in *Nolan* the claim for maintenance and cure was for less than $3,000. 194 F. 2d at 840 fn. 5.

Joinder has also been upheld in the Third Circuit, *Lindquist* v. *Dilkes*, 187 F. 2d 21, 25 (1942), and in the Seventh, *Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, 172 F. 2d 601, 604 (1948). In this Circuit claims for maintenance and cure have long been joined with Jones Act claims, apparently as here without objection, even where there was no diversity.

The mode of trial in actions governed by the Rules is dealt with, clearly and comprehensively, in F. R. Civ. Proc. 38 and 39. These rules set up a basic division between issues as to which the right of jury trial is "declared by the Seventh Amendment * * * or * * * given by a statute of the United States," and others. As to the former the right "shall be preserved to the parties inviolate," F. R. Civ. Proc. 38(a), subject only to timely demand, F. R. Civ. Proc. 38(b); even when timely demand has not been made, the court may in its discretion "upon motion" order a jury trial of such issues, F. R. Civ. Proc. 39(b). However, under the plain language of the Rules, that is the limit of the court's freedom. If the issue is not one triable to a jury as of right, the court is limited to an advisory jury, unless both parties consent to "a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right." F. R. Civ. Proc. 39(c). This meshes with the direction in Rule 52(a) that in non-jury matters "the court shall find the facts specially and state separately its conclusions of law thereon," a meshing made all the plainer by the 1946 amendment explicitly making Rule 52(a) applicable when there has been an advisory jury. When a complaint joins claims differing in character, each is to be given the mode of trial appropriate to its nature, *Dairy Queen, Inc.* v. *Wood*,——U. S.——(1962); *Ring* v. *Spina*, 166 F. 2d 546, 550 (2 Cir.), cert. denied, 335 U. S. 813 (1948); *Orenstein* v. *United States*, 191 F. 2d 184 (1 Cir. 1951); *Tanimura* v. *United States*, 195 F. 2d 329 (9 Cir. 1952); *Leimer* v. *Woods*, 196 F. 2d 828 (8 Cir. 1952); *Schaefer* v. *Gunzburg*, 246 F. 2d 11 (9 Cir.), cert. denied, 355 U. S. 831 (1957); *Chappell & Co.* v. *Palermo Cafe Co.*, 249 F. 2d 77 (1 Cir. 1957), although a prior jury verdict on a "legal" issue may conclusively determine an "equitable" one, *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959).

The sharp distinction made between the court's discretion to order an ordinary jury trial on an issue where this might have been but was not demanded, Rule 39(b), and the limitations imposed upon the court, Rule 39(c), with respect to issues "not triable of right," forbids a construction permitting a judge to order "a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right" on an issue where no right to such a trial exists, merely because he might deem this convenient. Nothing to the contrary is indicated by decisions that an appellate court will not always reverse because of erroneous grant of a jury trial, *Hurwitz* v. *Hurwitz*, 136 F. 2d 796, 799 (D. C. Cir. 1943); cf. *Cargill, Incorporated* v. *Commodity Credit Corporation*, 275 F. 2d 745 (2 Cir. 1960), as it would be obliged to do for erroneous denial of one; the question is how to obey the Rules, not the consequence of disobeying them. We must confess that we can now see no sufficient reason why the Rules should be so rigidly drawn;[8] we should think it desirable for a judge to have discretion to send to "a jury whose verdict has the same effect as if trial by jury had been a matter of right" all or part of equitable or maritime claims closely related to other claims on which jury trial is being had as of right, without as well as with "the consent of both parties,"[9] and would hope that those

[8] Perhaps the Committee justifiably thought it had done pretty well in accomplishing the merger of law and equity and did not wish to risk further ire from the proponents of equity by what might then have seemed a rather drastic proposal to give the judge discretion to order ordinary jury trial of an equitable claim.

[9] For example, a judge confronted with a maintenance and cure claim in a case such as this might like to have the jury determine finally, rather than on a merely advisory basis, whether plaintiff's ailment arose while in the service of the ship, since the jury would have to consider this on the personal injury claim, but reserve for himself the purely medical issue when maximum cure was effected if the verdict entitled the plaintiff to some award.

now engaged in revising the Rules would consider such a change. However, the language of the Rules is too clear for any such reading, and we are therefore obliged to reject the unexplained *per curiam* dictum of a divided court in *banc*, *Reardon* v. *California Tanker Company*, 260 F. 2d 369, 376 (2 Cir. 1958), cert. denied, 359 U. S. 926 (1959), that the mode of trial of a claim for maintenance, cure and wages joined with a claim for personal injury under the Jones Act rests in the discretion of the trial court, and address ourselves to the issue whether San Martin was given the right to jury trial of that claim "by the Seventh Amendment to the Constitution or * * * a statute of the United States," F. R. Civ. Proc. 38 (a).

(2) Appellant does not contend that jury trial of a claim for maintenance and cure is "declared by the Seventh Amendment." The guarantee of jury trial in that amendment is limited to "suits at common law," the "common law" being, in Mr. Justice Story's words, "the common law of England, the grand reservoir of all our jurisprudence." *United States* v. *Wonson*, 28 Fed. Cas. 745, 750 (C. C. D. Mass. 1812). The amendment is "limited to rights and remedies peculiarly legal in their nature," *Shields* v. *Thomas*, 59 U. S. (18 How.) 253, 262 (1856); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48 (1937). "By common law, they [the framers] meant what the constitution denominated in the third article 'law'; not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and maritime law and equity was often found in the same suit." *Parsons* v. *Bedford*, 28 U. S. (3 Peters) 433, 446-447 (1830). Since longshoremen's claims "are governed by the maritime law as established

by the Congress and are within the admiralty jurisdiction, the objection * * * as to the right of trial by jury under the Seventh Amendment is unavailing," *Crowell* v. *Benson*, 285 U. S. 22, 45 (1932); the same must be true as to seamen's. "Even in saving clause cases * * * where the plaintiff seeks a remedy which the common law is competent to give, there is not a *constitutional* right to jury trial; Congress could repeal the saving clause and make the federal admiralty remedy exclusive, with the clear result that there would be no right to jury trial in maritime cases." Currie, *supra*, at 5.

(3) In the light of the *Romero* decision, ruling out 28 U. S. C. § 1331 as a statute of the United States which might afford a right of jury trial on a claim for maintenance and cure, the only statutes of the United States requiring consideration are the Jones Act and the saving clause.

(a) The Jones Act provides that "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *." We held in *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437 (2 Cir.), cert. denied 359 U. S. 1000 (1959), that when a seaman suing for personal injury under the Jones Act predicated his action both on unseaworthiness and on negligence, both claims must be submitted to the jury. Judge Medina, writing for Judge Clark and himself, based this decision, 263 F. 2d 446, on "the fundamental singleness of the underlying claim, the fact that the Jones Act claim and the maritime claim, of unseaworthiness," both claims in tort, generally predicated on the same facts and carrying the same measure of damages, "are so intertwined factually that they

cannot as a matter of practice be separated into pieces." In that sense and in that only the unseaworthiness claim was described as "pendent," 263 F. 2d at 447. Judge Lumbard, concurring, proposed a further ground, 263 F. 2d at 449-453, namely, "that the Jones Act, in permitting an action 'at law' for 'damages' for 'personal injury' to seamen, permitted them such an action based on the maritime doctrine of unseaworthiness as well as the legislative maritime doctrine of negligent operation." In a sense the result in the *Bartholomew* case followed rather inevitably from the Supreme Court's decision in *Baltimore SS. Co.* v. *Philips*, 274 U. S. 316 (1927), that a judgment on a claim for personal injury based on unseaworthiness will bar assertion of a claim for the same injury based on negligence, and from *Pate* v. *Standard Dredging Co.*, 193 F. 2d 498, 502 (5 Cir. 1952), relied on by Judge Medina, 263 F. 2d 446 fn. 12, holding that a claim of unseaworthiness was not a "separate and independent claim or cause of action" so as to permit removal of a Jones Act claim under 28 U. S. C. § 1441(c). Since the claim for maintenance and cure in the *Bartholomew* case had been tried to a judge in accordance with what had become the established practice in this circuit, nothing in the opinion was addressed to the mode of trial of such a claim.

It has long been recognized that the relationship of a claim for maintenance and cure to one for personal injury under the Jones Act is wholly different from the allegation of unseaworthiness in addition to negligence as a basis for the personal injury claim. The distinction was sharply drawn in *Pacific SS. Co.* v. *Peterson*, 278 U. S. 130 (1928), by the same bench that had decided the *Phillips* case eighteen months before. Receipt of maintenance and cure, the Court held, did not bar a subsequent action for personal injury under the Jones Act as a judgment in respect of unseaworthiness would. Mr. Justice Sanford disavowed, 278 U. S. 136, a previous expression of his in *Engel* v.

Davenport, 217 U. S. 33, 36 (1926), which might be taken "to mean that the right to recover compensatory damages under the new rule was granted as an alternative to the allowances covered by the old rules, including maintenance, cure and wages *** *" The right given by the Jones Act "is not an alternative of the right under the old rule to 'maintenance, cure and wages'—which arises, quite independently of negligence, when the seaman falls sick or is injured in the service of the ship, and grows out of that which was termed in The Montezuma (C. C. A.), 19 F. 2d 355, 356, the 'personal indenture created by the relation of the seaman to his vessel,'" a right "implied in law as a contractual obligation arising out of the nature of the employment" and "independent of the right to indemnity or compensatory damage for an injury caused by negligence," 278 U. S. 137-138.

It is not unnatural that, with this guidance, most Courts of Appeals took a radically different approach to the status of a claim for maintenance, cure and wages vis-a-vis a claim for personal injury under the Jones Act with which it had been joined, than with respect to the assertion of unseaworthiness in addition to negligence as a basis for recovery. The *Pate* decision, *supra*, assumed, 193 F. 2d 502, that a claim for maintenance and cure constituted a "separate and independent claim" under 28 U. S. C. §1441(c), which would have warranted removal in a case of diverse citizenship if jurisdictional amount existed. Somewhat earlier, dealing with the very question here presented, Judge Maris had written, for a unanimous court *in banc*, that it was error to send to a jury a claim for maintenance and cure joined with a claim for personal injury under the Jones Act, *Jordine* v. *Walling*, 185 F. 2d 662, 671 (3 Cir. 1950), a decision shortly followed in *Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, 191 F. 2d 82, 85-86 (7 Cir.), cert. denied, 342 U. S. 888 (1951). The

leading text thus correctly states, "By unquestionable authority a maintenance and cure claim is 'separate and independent' from both a Jones Act claim or an unseaworthiness claim for purposes of *res judicata* or § 1441 (c) or anything else." Gilmore and Black, Admiralty, p. 341. And we ourselves have recently said, in *Ryan* v. *United States Lines Company*, —— F. 2d ——, —— (2 Cir. 1962), that the claims are "totally different."

The differences exist both in the legal nature of the claims and in the practicalities of trial. The personal injury claim sounds in tort; the claim for maintenance, cure and wages "has its source in a relation which is contractual in orgin, but given the relation, no agreement is competent to abrogate the incident," *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 371 (1932); see *Vaughan* v. *Atkinson*, —— U. S. —— (1962). The amount sought is likewise different; that involved in the claim for maintenance, cure and wages is usually a small fraction of that sued for in the personal injury claim. Even though the incident contended to give rise to the personal injury claim is found never to have occurred, the seaman will still be entitled to maintenance, cure and wages if his condition arose in the service of the ship. The litigated points on the latter claim are simply whether the condition arose in the seaman's service and when maximum cure has been effected; this is usually a contest of medical experts, on issues the former of which may have little and the latter has no relation to the personal injury claim.

However, the practice in this Circuit until 1956 seems to have been to submit a claim for maintenance and cure to the jury along with a claim under the Jones Act, even though no diversity existed. The legal basis for this, and the contrary authorities in other circuits were not discussed, although the practice was noted, without disapproval, in *McAllister* v. *Cosmopolitan Shipping Co.*, 169 F.

2d 4 (1948), rev'd on other grounds, 337 U. S. 783 (1949); *Gonzales* v. *United Fruit Co.*, 193 F. 2d 479 (1951); and *Rosenquist* v. *Isthmian SS. Co.*, 205 F. 2d 486 (1953). *Weiss* v. *Central R. Co.*, 235 F. 2d 309 (1956), was the turning point. This Court's opinion, by Judge Clark, mentioned in a footnote that the judge had decided the maintenance and cure count, at the plaintiff's request and, apparently, without objection by the defendant—"Hence there is not involved the practice followed in this circuit of submitting the issue of maintenance and cure to the jury, along with the issue of negligence," citing the *Gonzales* case, *supra*. The footnote added "Obviously the simultaneous trial of the two claims—one to the judge sitting in admiralty and the other to the jury—is convenient and proper." This considered statement and its approving citation of *Jordine* v. *Walling* and *Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, *supra*, caused the district courts in this circuit generally to alter their practice so that, although unseaworthiness claims joined in Jones Act suits have regularly been submitted to the jury even though there be no diversity, claims for maintenance and cure in non-diversity cases have been reserved for trial by the judge. See, e.g., *Troupe* v. *Chicago, D & G. B. Transit Co.*, 234 F. 2d 253, 256 (1956); *Bartholomew* v. *Universe Tankships, Inc.*, *supra*, cert. denied, 359 U. S. 1000 (1959); *Murray* v. *New York Central R. Co.*, 287 F. 2d 152, 153, cert. denied, 366 U. S. 945 (1961); *Salem* v. *United States Lines Co.*, 293 F. 2d 121, 124, rev'd on other grounds, —— U. S. —— (1962). Since the district judges were following the lead we had given them in *Weiss*, we naturally approved; and the later dictum as to discretion, in *Reardon*, appears to have had little or no practical effect.

(b) It is now urged that even though the claim for maintenance, cure and wages be not "pendent" to the personal injury claim in the limited sense defined in *Bartholomew*,

it is "pendent" in a more general sense which entitled the plaintiff to a jury trial under the "saving clause."[10] The Supreme Court pointed out in *Romero*, 358 U. S. 380-381, the anomaly of applying the "pendent jurisdiction" doctrine of *Hurn* v. *Oursler*, 289 U. S. 238 (1933)—that the assertion of a Federal claim permits a Federal court to decide a sufficiently related non-Federal claim otherwise outside its jurisdiction—to a claim for maintenance and cure which is always within Federal jurisdiction under 28 U. S. C. § 1333(1), as, indeed, both Judge Medina and Judge Lumbard had done a few weeks earlier in *Bartholomew*, 263 F. 2d at 449, 455. Moreover, *Hurn* v. *Oursler* relates to the jurisdiction of a Federal court to decide a claim—not to the mode of trial; no one has ever supposed that joinder of a "state" equitable claim with a related "federal" legal claim under *Hurn* v. *Oursler* entitled the former to a jury trial. We see no reason for a different result when the joined claim is a Federal claim arising under the general maritime law.

We likewise see no force in an argument that if the door to the "law side" of the Federal court is unlocked by a claim under 28 U. S. C. § 1331, here the Jones Act, the "saving clause" takes over and gives a right to jury trial on any claim for a money judgment properly joined, despite its maritime nature, just as if the door had been unlocked by diversity, § 1332. This overlooks what the saving clause was to save. The framers of the First Judiciary Act were concerned with the many maritime claims for money judgments, which during the Revolution and under the Articles of Confederation had generally been tried in courts of the

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[10] The change in language in the saving clause by the Judicial Code revision of 1948 is without significance—the Reviser's Note stating that the "substituted language" had been used as "simpler and more expressive of the original intent of Congress * * *" See Gilmore and Black, Admiralty (1956), 35.

colonies or the states,[11] conveniently located to the suitors, and with jury trial. The prime purpose of the saving clause was to insure that such suits could continue to be brought and tried where and as they had been, *New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344, 390 (1848); *Romero* v. *International Terminal Operating Co.*, 358 U. S. 362. However, the grant of diversity jurisdiction allowed an out-state defendant sued by an in-state plaintiff on a maritime claim in a state court to remove such a suit to the circuit court, and a plaintiff of diverse citizenship to bring it there. In order to prevent this from altering the mode of trial, as well as to preserve for the diversity plaintiff suing in the circuit court the same mode of trial he would have had in the state court, there was developed the rule, noted in section III of this opinion, that when a maritime claim for a money judgment is heard in a Federal court because of diversity, the saving clause entitles the parties to the same jury trial they would normally have had in the state court. It was stated from an early date that the common law remedy preserved by the saving clause existed in the Federal courts only in diversity cases. *The Belfast*, 74 U. S. (7 Wall.) 624, 643 (1869); *Leon* v. *Galceran*, 78 U. S. (11 Wall.) 185, 188 (1871); *Steamboat Co.* v. *Chase*, 83 U. S. (16 Wall.) 522, 533 (1873), to which, broadly speaking, the circuit courts were limited until 1875, 18 Stat. 470.

The saving clause considerations thus calling for a jury trial of a maritime claim in a diversity case are in no way pertinent to a non-diversity maritime claim joinable but not unitary with a statutory claim to which Congress has accorded jury trial. Existence of a related Federal statutory claim does not expose the plaintiff suing in a state court under the saving clause to a risk of removal, as

[11] Although some colonies and states created admiralty courts after 1776, the jurisdiction of most of these was limited to prize cases. See Putnam, How the Federal Courts Were Given Admiralty Jurisdiction, 10 Corn. L. Q. 460 (1925).

diversity does; he may protect himself, by limiting his state court action to his non-statutory claim.[12] Moreover, in the Jones Act, Congress specifically provided that the new statutory claim should not itself be removable, 28 U. S. C. § 1445(a); hence even the joinder of such a claim with one for maintenance and cure does not give the defendant any right to remove the latter that he would not otherwise have had. Neither does the new statutory claim afford a non-diversity plaintiff a new opportunity to deprive the defendant of jury trial of the non-statutory claim by suing in the Federal court under § 1331—the plaintiff could always have had non-jury trial of the maritime claim by suing in admiralty under § 1333. Finally, whereas jury trial is needed to give the diversity plaintiff the same right in the Federal that he would have had in the state court, there is no similar basis for Federal solicitude with respect to the non-diverse plaintiff. Hence there is no reason why a claim for maintenance and cure should stand any differently with respect to jury trial in a Federal court after the Jones Act than before, unless the very existence of the new statutory claim demands this. A unanimous Supreme Court in 1928, far closer to the Jones Act than we, unmistakably considered that the Act had left maintenance and cure exactly as this had always been, *Pacific SS. Co.* v. *Peterson, supra;* we would see no reason for a different view even if we had the power to take one. We conclude that since neither the Jones Act nor the saving clause gave plaintiff a right to jury trial of his claim for maintenance and cure, it would have been error, under Rules 38 and 39, to grant him one, save on an advisory basis.

The judgment is affirmed.

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[12] Although 28 U. S. C. § 1441 permits removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction," the saving clause forbids a literal reading that would include actions of which a district court would have jurisdiction solely because of 28 U. S. C. § 1333. *Hill* v. *United Fruit Co.*, 149 F. Supp. 470 (S. D. Cal. 1957).

CLARK, *Circuit Judge*, whom Judges HAYS and MARSHALL join, dissenting:

Commentators have had occasion to refer to the Jones Act, 46 U. S. C. § 688, passed in 1920, as an example of "impossibly bad drafting." Gilmore & Black, The Law of Admiralty 282 (1957). But since 1940 "the Supreme Court has been rewriting the law" and the "rewrite job has gone far enough to make it clear that a revolution has taken place." *Ibid.* 248. In this process, recovery for personal injuries for unseaworthiness has practically swallowed Jones Act negligence, which remains only as a convenient tag upon which to ground jurisdiction "at law" and trial by jury as granted in the statute. It is now clear that claims based on unseaworthiness and on maintenance and cure may be joined with claims for negligence, and that there is a right of trial by jury on the unseaworthiness claim so joined. *Bartholomew* v. *Universe Tankships, Inc.*, 2 Cir., 263 F. 2d 437, certiorari denied 359 U. S. 1000; and see *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 380-381. Left undecided is the question here at issue, namely whether there is a right to jury trial on the claim for maintenance and cure when joined with a claim for Jones Act negligence.

That this is a serious and troublesome issue is shown by the three different opinions held by us on this appeal. Differences are perhaps natural in view of the clash of policy between safeguarding a cherished admiralty right, long antedating the Jones Act, on the one hand, and the clarity and convenience of the unitary approach now being achieved under that Act on the other. The rationale of that approach seems such as to include all three of the claims we are considering in situations such as here disclosed, and we have concluded that they should be treated alike so far as the form of trial is concerned.

Before analyzing this more carefully we should note that a claim for maintenance and cure may be asserted on quite other facts than those of the accident giving rise to the claims for damages for personal injuries, and the claim may therefore be one remediable only in admiralty. What we are dealing with are overlapping claims arising out of a single accident—the situation here, as expressly alleged in the complaint. Many of the cases cited by my brother FRIENDLY to show the separate nature of the maintenance-and-cure claim are those where there were not overlapping claims or where the defendant did not show that an award so made involved double recovery, while others were those where the parties failed to object to a court trial. It seems that only lately has this problem of duplicating recoveries assumed the importance it deserves. But once perceived, there is no question about the answer and the need to avoid such duplication of recovery. Thus in the second *Bartholomew* case we remanded specifically for the deduction of such overlapping recoveries, holding the burden on the defendant to show the amount thereof. *Bartholomew* v. *Universe Tankships, Inc.*, 2 Cir., 279 F. 2d 911, 916-917, citing cases such as *McCarthy* v. *American Eastern Corp.*, 3 Cir., 175 F. 2d 727, certiorari denied 338 U. S. 911; *Smith* v. *Lykes Bros.-Ripley S.S. Co.*, 5 Cir., 105 F. 2d 604, certiorari denied *Lykes Bros. Ripley S.S. Co.* v. *Smith*, 308 U. S. 604; and *Reardon* v. *California Tanker Co.*, 2 Cir., 260 F. 2d 369, certiorari denied 359 U. S. 926. See also Gilmore & Black, The Law of Admiralty 261 (1957). The inconvenience and often error of this duplicating form of trial points to the need for a rule of law preserving the unitary approach to include a claim for maintenance and cure, as well as of negligence and unseaworthiness, all arising out of the same accident. Further, the doctrine of collateral estoppel will bar relitigation of issues and facts settled in earlier litigation and may thus operate in particular

instances even to cut down the jury trial now so thoroughly supported under the *Bartholomew* principle. See *McCarthy* v. *American Eastern Corp., supra,* 3 Cir., 175 F. 2d 727, certiorari denied 338 U. S. 911; *Runyan* v. *Great Lakes Dredge & Dock Co.,* 6 Cir., 141 F. 2d 396; *La Fontaine* v. *The G. M. McAllister,* D. C. S. D. N. Y., 101 F. Supp. 826.

In the light of these well settled principles it would seem that careful analysis supports the teaching of practical convenience and necessity to the effect that the single claim or cause should be considered at the one trial. As Judge FRIENDLY shows, a presently popular rationale treats the additional admiralty claims as "pendent" to the Jones Act claim "at law" for negligence. See *Bartholomew* v. *Universe Tankships, Inc., supra,* 2 Cir., 263 F. 2d 437, 448, certiorari denied 359 U. S. 1000; *Romero* v. *International Terminal Operating Co., supra,* 358 U. S. 354, 380-381; *Michalic* v. *Cleveland Tankers, Inc.,* 364 U. S. 325, 331. Another approach is that of Judge LUMBARD in the first *Bartholomew* case, 2 Cir., 263 F. 2d 437, 448, that the Jones Act itself should be construed as broad enough to include all these claims in its aegis. These are but differing ways of stating the same result, which goes back to "the fundamental singleness of the underlying claim" where "the legal theories differ somewhat," but "from the standpoint of the parties the facts all exist as a single unit." Medina, *J.*, in 2 Cir., 263 F. 2d 437, 446, 447. To the writer clarity and convenience in thinking are promoted by viewing the situation in terms of the single cause of action, the identic factual situation which may give rise to several rights of action or legal remedies. "On any realistic appraisal there should be only one cause of action for jurisdiction and hence for trial. When a seaman has been injured his total claim should not be butchered up. He should be able to put it forward either wholly in admiralty without any right of jury trial, or wholly at law with a right of jury trial on

all the issues." 5 Moore's Federal Practice 284 (2d Ed. 1951).

This points the way to a logical as well as convenient solution. When the claim for maintenance and cure is based on a cause of action unconnected with that upon which the claims of negligence and unseaworthiness are founded, then the claim must be pursued in admiralty and there is no right to a jury trial. When, however, all the claims are based on the same cause of action, then they must be tried as a unit and the right of jury trial accorded by the Jones Act applies to all the contentions. That is the situation here under the issues tendered by the complaint; and since the plaintiff pressed his claim for jury trial, the court was in error in reserving trial to itself.[1]

The approach we have made accords with the authorities we have cited and is not precluded by any specific precedent, so far as we are advised. True, there is much by way of dicta or lack of discussion or even overlooking of the point, all of which adds to the confusion. Actual decision is scanty to the point of nonexistence. This fact, plus undoubted dicta (in which the writer also has participated), does lend support to the approach of our brothers WATERMAN and SMITH, suggesting that we might still continue to rely upon our past statements, holding maintenance and cure a remedy always available also in admiralty, until the Supreme Court tells us otherwise. But notwithstanding our sympathy for this view, we are constrained to conclude that we must go where reason and practical necessity take us,

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[1] Seemingly the scholarly commentators support the unitary approach and trial by jury as the preferred course. See Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. Chi. L. Rev. 1, 4-6, 41-51, 58-65, esp. 63-64 (1959); Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 Harv. L. Rev. 817, 849, 850 (1960); 73 Harv. L. Rev. 138, 142-146 (1959); 5 Moore's Federal Practice 284 (2d Ed. 1951); Gilmore & Black, The Law of Admiralty 262 (1957).

namely to the unitary form of approach and the resulting trial by jury as we have outlined.

There remains the third approach to this issue, that set forth by judge FRIENDLY speaking for himself and three other members of the court. We are constrained to hold this the least satisfactory of the three on policy, precedent, and logical analysis. First it is held that, while normally a jury trial may be had of maintenance and cure when jurisdiction is based on diversity of citizenship, such claim was here lost or waived by inadequate pleading or disclosure to the court. This, we suggest, is cavalier treatment of perhaps the most cherished of all procedural rights and is not justified on the record before us.[2] No precedent is cited for this novel restriction on the jury trial right. Then

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[2] This is based in substance upon the failure of the complaint to set forth the plaintiff's citizenship, jurisdiction being there based on the Jones Act. But under modern civil procedure, the jury trial right comes from the Constitution, not the trial court, and such trial being once claimed (as here in the plaintiff's complaint) cannot be lost unless it is waived by written stipulation or oral stipulation made in open court. F. R. 38(b)(d); 39(a); James, *Trial by Jury and the New Federal Rules of Procedure*, 45 Yale L. J. 1022 (1936); Clark, Code Pleading 113-122 (2d Ed. 1947). There is no requirement that a party must plead in such a way as to warn the court of his constitutional right. Actually here the plaintiff's counsel in pressing his claim in successive colloquies at the opening of trial cut short by the judge's adverse rulings made broad contentions quite adequate to cover this issue. Thus he specifically cited jury trials of state actions at law for maintenance and cure. Indeed it is difficult to see how he could have put his claim more inclusively unless he could have foreseen the novel trend my brothers' opinion was later to take. Rather inconsistently they hold that the claim for jury trial of the issue as *pendent* to the main issue was sufficiently asserted to require disposition even though "pendent" was never mentioned in the colloquies. Further the court is bound to examine the entire record to see if San Martin's citizenship was there disclosed, *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 2 Cir., 234 F. 2d 253, 257-258, and amendment of the pleadings, even on appeal, is directed by 28 U. S. C. § 1653. See *Brooks* v. *Yawkey*, 1 Cir., 200 F. 2d 663, 664.

it is held that all claims for maintenance and cure not brought in the court's diversity jurisdiction must invariably be tried to the court. This presents the unusual spectacle of a forced court trial and of course rejects the unitary approach by arbitrary fiat and not for policy or convenience in the large number of cases to which it is applicable.[3] The result is necessarily a rigid compartmentalized system where jury trial must be had in some of the cases, and court trial in others. Since this division is unconnected with the practicalities of the situation, since in this type of case it is easy to overlook the citizenship of the parties where the Jones Act is the primary source of federal jurisdiction, we must necessarily expect reversals

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[3] This appears to be a complete acceptance in this area of the law, and a rejection of our settled rule to the contrary, of the holding in *Jordine* v. *Walling*, 3 Cir., 185 F. 2d 662, that jury trial of the issue of maintenance and cure constitutes reversible error. This holding, which has been widely criticized by scholars—see the writers cited in note 1 *supra*, and notably Professors Moore and Currie—has not been followed in the First Circuit, where the practical need of jury trials has been ably set forth by Judge Wyzanski in the oft-cited case of *Jenkins* v. *Roderick*, D. C. Mass., 156 F. Supp. 299, 304-306, following *Doucette* v. *Vincent*, 1 Cir., 194 F. 2d 834, 840, 846. We have cited with approval Professor Moore's criticism, 5 Moore's Federal Practice 281-285 (2d Ed. 1951), *supra*, of the *Jordine* case as improperly dividing up a single cause of action, and have never found error in the submission of this issue to a jury, *Gonzales* v. *United Fruit Co.*, 2 Cir., 193 F. 2d 479, 480 n. 1; see also *Rosenquist* v. *Isthmian S.S. Co.*, 2 Cir., 205 F. 2d 486, and *McAllister* v. *Cosmopolitan Shipping Co.*, 2 Cir., 169 F. 2d 4, reversed on another issue 337 U. S. 783. A dictum in a footnote in *Weiss* v. *Central R. Co. of N. J.*, 2 Cir., 235 F. 2d 309, 310, n. 1, has occasionally been misread as expressing a preference for court trial of this issue, even though it cited and relied on the *Gonzales* case, and only ventured to suggest that the trial judge had also discretion to order a court trial. That suggestion we now believe should be withdrawn for the reasons stated in the text of this dissent.

based on form rather than substance.[4] We fear the unsatisfactory results which will ensue from this novel formalism in the general maritime law.

Our conclusion therefore is that the district court erred in depriving the plaintiff of his asserted right to a jury trial of his entire cause of action. The judgment should therefore be reversed and the action remanded for a trial to the jury.

SMITH, *Circuit Judge*, Concurring in the result:

Judge Waterman and I concur in the result reached by Judge Friendly and our three colleagues who have concurred in his opinion. We affirm, with them, the action of the court below. We agree that when a maintenance and cure claim arising out of the same event that gave rise to the Jones Act claim is coupled with the Jones Act claim and therefore tried on the "law side" of the court, and the parties are of diverse citizenship,[1] the maintenance and cure claim must be tried to a jury. We agree that, when the parties are not of diverse citizenship, even though the Jones Act claim is tried to a jury, it is proper to try the maintenance and cure claim to the judge alone.

---

[4] The stress placed on the supposed compulsion of F. R. 39(c) seems out of place, for the rules provide only a procedure for working out the substantive rules of trial elsewhere stated, as in the Constitution or statutes. If a trial judge does take a jury verdict when he is not required to do so, error cannot be assigned on his action. *Hurwitz* v. *Hurwitz*, D. C. Cir., 136 F. 2d 796, 799, 148 A. L. R. 226; *Rath* v. *Wilgus*, 110 Neb. 810, 195 N. W. 115; *Groome* v. *Steward*, D. C. Cir., 142 F. 2d 756; Clark, Code Pleading 90, 102, 106, 107 (2d Ed. 1947).

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[1] By the phrase "diverse citizenship" we include all prerequisites for so-called "diversity jurisdiction" on the law side of a federal district court, not simply a pleading that the parties are residents of different states.

We are also of the opinion, however, and in this respect we differ from our colleagues, that in this latter situation the trial judge may deem it advisable to submit the maintenance and cure claim to the jury along with the Jones Act claim, and if this is done we would not consider such a submission erroneous but well within a proper discretion so as to preserve a unitary case.

When in a non-diversity case a maintenance and cure claim is presented for adjudication with a Jones Act claim, but the maintenance and cure claim does not arise out of the same event as the Jones Act claim, we are of the opinion that the maintenance and cure claim should always be tried to the court alone, and never submitted to the jury, even if the Jones Act claim is jury-submitted.

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of June one thousand nine hundred and sixty-two.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

" CHARLES E. CLARK,
" STERRY R. WATERMAN,
" LEONARD P. MOORE,
" HENRY J. FRIENDLY,
" J. JOSEPH SMITH,
" IRVING R. KAUFMAN,
" PAUL R. HAYS,
" THURGOOD MARSHALL,
Circuit Judges.

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MARTIN, deceased,
Plaintiff-Appellant,

v.

UNITED STATES LINES COMPANY,
Defendant and Third Party Plaintiff-Appellee,

UNITED STATES OF AMERICA,
Third Party Defendant.

Appeal from the United States District Court for the Southern District of New York.

Judgment of United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the defendant-appellee.

A. DANIEL FUSARO,
Clerk.

by VINCENT A. CARLIN,
Chief Deputy Clerk.

Office-Supreme Court, U.S.
FILED
NOV 26 196
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1962.

DOCKET NO. [redacted] 463

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of Andres San Martin, deceased,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

BRIEF OF RESPONDENT, UNITED STATES LINES COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MATTHEW L. DANAHAR,
Attorney for Respondent,
120 Broadway,
New York 5, New York.

CHARLES N. FIDDLER,
JOSEPH R. KELLEY, JR.,
Counsel.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Supreme Court of the United States

OCTOBER TERM, 1962.

DOCKET NO. 461.

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of Andres San Martin, deceased.

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

BRIEF OF RESPONDENT, UNITED STATES LINES COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Court of Appeals is reported at 306 F. 2nd 461. The opinion and findings of fact and conclusions of law of the District Court are not reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 29, 1962.

It is not disputed that the jurisdiction of this Court is invoked by virtue of 28 U. S. C. Section 1254 (1) and 2101 (c). However, the petition fails to show sufficient reason to justify a review by this Court and that there exists any of the grounds for granting a writ as set forth in Rule 19 of the Revised Rules of this Court.

Questions Presented.

1. Was the original plaintiff entitled to a jury trial as of right with respect to his second cause of action for maintenance and cure on the basis that;

(a) There was an undisclosed and unasserted diversity of citizenship between the parties

(b) The second cause of action was joined with a cause of action which alleged a right to recover damages pursuant to the provision of 46 U. S. C. 688 (Jones Act)?

2. Was original plaintiff denied the right to submit to the jury, as part of his Jones Act suit, his claim for aggravation of injuries allegedly caused by defendants' failure to provide timely, adequate and competent medical care and attention, and maintenance and cure?

3. Was reversible error committed by the district judge in excluding certain evidence offered by the original plaintiff?

Statement.

Andres San Martin, a seaman who died during the pendency of the appeal to the Court of Appeals*, sued United States Lines Company, his employer, for injuries allegedly sustained aboard its vessel, the SS. *American Reporter*.

The complaint contained two causes of action. The first cause of action set forth two separate theories under which recovery was sought; (1) Negligence under the Jones Act, 46 U. S. C. 688; (2) Unseaworthiness under the General

* San Martin died on November 6, 1960. The Public Administrator was appointed Administrator of his estate on October 3, 1961 and was substituted as Plaintiff-Appellant in this case on October 10, 1961.

Maritime Law. As part of his Jones Act claim the original plaintiff also alleged defendant's failure to provide him with timely, adequate and competent medical care and attention and maintenance and cure, which resulted in an aggravation of his injuries. The second cause of action was to recover sums allegedly due for maintenance and cure, earned wages and wages to the end of the voyage.

There was no allegation of diversity of citizenship set forth in the complaint and it did not even allege the citizenship of the plaintiff.

At the outset of the trial and before the jury was selected, the District Judge, over the objection of San Martin's attorney, ruled that the second cause of action for maintenance and cure would be decided by him at the end of the presentation of all the evidence.

The action was tried before the Honorable Richard H. Levet and a jury and resulted in a jury verdict for the defendant on the first cause of action and an award by the Court, sitting without the jury of $224.00, plus interest, on the second cause of action for maintenance and cure. Judgment was entered on the 6th day of September, 1960.

Facts.

San Martin, age 62 at the time of trial, joined the SS. *American Reporter* in November, 1953 as a wiper. On November 5, 1954, while the vessel was tied up at the Brooklyn Army Terminal, San Martin claimed that he was injured while he and two other wipers were engaged in loading engine room stores aboard the vessel from the dock. The stores, in addition to other items, included four 100 pound metal drums of boiler cement and one 200 pound drum.

The order to bring the stores aboard was given by First Assistant Engineer Quellmalz to engine room utilityman

Manzo (38)* who in turn directed San Martin (111) and two other wipers, Murrell and Rosales, to perform the work.

San Martin complained to Manzo about bringing the drums aboard manually, but was told "you have to do it anyway" (860-861). The 200 pound drum was rolled up the gangway (168). San Martin, on separate occasions, carried two of the 100 pound drums aboard on his shoulder (34, 35, 39). Murrell, one of the other wipers, also carried one of the drums aboard (171). It was not shown how the fourth drum was brought aboard.

The gangway was supplied by the United States of America. It was either 42 or 45 feet long, with wooden handrails and rigged at an angle of approximately 25 degrees.

San Martin testified that while carrying the second 100 pound drum up the gangway, the drum and gangway moved and he moved from side to side and had to hold onto the rope handrail (39, 40, 65). The rope handrails were not very taut (64). As shown by United States of America's Exhibit C, the handrails were wooden and not rope. He experienced pain in his back and left leg at this time (40) and stopped but then continued up the gangway to the deck of the vessel with the drum (102, 103).

On the evening of November 7, 1954, the vessel sailed for London. During the crossing, San Martin's back continued to pain him. There was nothing in the vessel's medical log (Plaintiff's Exhibit 2) showing that San Martin reported his accident before the vessel sailed or during the crossing, although there is an entry on December 5, 1954, a month after the alleged accident, showing that he complained of "soreness in the muscles of right leg" which had originated the day before.

On the termination of the voyage in New York on or about December 15, 1954, San Martin was given a Master's

* References are to the stenographer's minutes.

Certificate for medical treatment at the United States Public Health Service Clinic at Hudson & Jay Streets in New York City. He received outpatient treatment there from December 20, 1954 to January 12, 1955. From January 12th to March 1st, 1955, he was an inpatient at the United States Public Health Service Hospital on Staten Island (Plaintiff's Exhibits 3 and 4). San Martin's condition was diagnosed as:

1. aneurysm of aorta due to arteriosclerosis;
2. herniation of nucleus pulposus due to unknown cause;
3. syphillis of undiagnosed site.

According to the Staten Island records, San Martin denied "trauma to back or legs" at the time of admission.

When discharged from the hospital, he was marked "Not fit for duty, indefinitely", and it was noted that he had received maximum hospital benefits (Plaintiff's Exhibits 3 and 4). The hospital records did not show that he had ever returned for treatment nor was there any proof offered to show this fact.

At the end of the case and before it was given to the jury, San Martin's attorney withdrew any claim based upon the nature of the gangway or the operation of the gangway or its position (864). Accordingly, United States Lines Company consented to a dismissal of its third party action against the United States of America.

Reasons for Denying the Writ.

It is well recognized that the power of this court to review is sparingly exercised and its jurisdiction can only be invoked when the the matter involved is of general importance to the public at large or there is a conflict in the

decisions of the Courts of Appeals of the circuits. As was pointed out by Justice Frankfurter in *Rogers* v. *Missouri Pacific RR Co.*, 352 U. S. 500, certiorari should only be granted to secure uniformity of decision between the Circuit Courts of Appeals or to bring up for review cases involving questions of importance which it is in the public interest to have decided by the Supreme Court. The jurisdiction of the court cannot be invoked merely to give the defeated party in the Circuit Court of Appeals another hearing.

Despite petitioner's assertion to the contrary there is no real conflict between the Circuit Courts of Appeals on the question of the right to a jury trial on a claim for maintenance and cure that is pendent to a Jones Act claim.

As to the other reasons asserted by the petitioner for granting certiorari, these clearly do not involve any conflict in the circuits and are not matters of substantial importance to be considered by this court. One of them deals merely with the question of the trial judge's discretion to exclude certain evidence and the other with whether the petitioner should have been given a jury trial on the basis of diversity when it was not alleged in the complaint and petitioner's attorney at no time in the lower court claimed the right to a jury trial on this basis.

The refusal of six of the Circuit Judges sitting in banc to allow the public administrator a trial by jury of the seaman's claim for maintenance and cure as a matter of constitutional or statutory right (in place of the trial before the judge who awarded the seaman appearing before him a sum which the entire court held not to be erroneous) simply to support the apparent hope of the administrator that he might fare better before a jury, does not, under the peculiar facts of this case, present a real question which a decision by this court would resolve.

While the discussion by the Court of Appeals below is of academic interest, the propriety of a jury trial of a maintenance and cure claim already had or directed, as a matter of policy or discretion or its binding or advisory effect, is not involved. What is involved is the assertion by a public administrator of an absolute right to a jury trial of a deceased seaman's maintenance and cure claim and the nullification of the clearly correct decision by the trial court who had the opportunity to judge his credibility in the courtroom.

Argument.

It is the petitioner's contention that the trial court, by withholding the maintenance and cure claim, i.e, the second cause of action, from the jury, violated the plaintiff's right to a jury trial. This contention is based on two theories: (1) that San Martin had invoked the court's diversity of citizenship jurisdiction; and (2) that the claim for maintenance and cure was pendent to his Jones Act claim which was triable of right to the jury.

Diversity.

It is well settled that when a maritime claim such as this is commenced in the federal court on the ground of diversity of citizenship, the parties are entitled to a jury trial. However, it is elementary that in order to invoke the diversity jurisdiction of the court the party must plead and prove diversity of citizenship or at least inform the parties and the court of the intention to rely on diversity. The petitioner failed to plead diversity of citizenship and did not indicate in any way in the district court that he was relying on it. The first time it was mentioned was in his brief on appeal to the Court of Appeals.

At the outset of the trial, the trial judge, over the objection of petitioner's attorney, ruled that the cause of action for maintenance and cure would not be submitted to the jury for determination but would be decided by him. When the trial judge first made his ruling petitioner's attorney merely objected without giving any reason (9) accordingly the trial judge adhered to his ruling (9).

On the following day, before the taking of any testimony, petitioner's attorney again objected to the Court's ruling on this matter and in support of his objection cited the case of *Jenkins* v. *Walker*, without giving any citation, although mentioning that it was a case in the District of Massachusetts, First Circuit. He also mentioned the fact that the *Jenkins* case had been discussed by the United States Supreme Court in *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959) (18, 19, 20). The *Jenkins* case referred to was obviously *Jenkins* v. *Roderick*, 156 F. Supp. 299 (D. Mass. 1957) which dealt with the question of whether a maintenance and cure cause of action was pendent to a Jones Act claim. Thus, the only reason given to the trial judge to have him change his ruling was that there was pendent jurisdiction in the instant case. Naturally, it was not pointed out that the pleadings showed diversity of citizenship and there was not even a suggestion that the petitioner's attorney intended to prove diversity of citizenship or was relying on it.

Even after San Martin had testified and had indicated, although by no means conclusively that he was a citizen of New York or Spain, his attorney never called this fact to the Court's attention and asked for a jury trial on the maintenance and cure cause of action on a diversity basis.

Accordingly, the lower court was clearly justified in its original ruling.

PENDENT JURISDICTION.

Petitioner's second theory is that, aside from diversity a jury trial on the maintenance and cure cause of action was required because it was "pendent" to the Jones Act cause of action.

Six of the judges of the Court of Appeals rejected petitioner's contention and held that he was not entitled as of right to a jury trial on this basis. Petitioner asserts that this decision is in direct conflict with the First Circuit in *Mitchell* v. *Trawler Racer, Inc.*, 265 F. 2nd 426 (1959) and for this reason certiorari should be granted.

As Judge Friendly indicated in the court below at p. 470 the issue is whether the deceased seaman had a right to a jury trial of his claim for maintenance and cure based upon the Seventh Amendment to the Constitution or a statute of the United States.

The only authority cited to the trial judge in support of the claim of the right to a jury trial was a decision of the District Court of Massachusetts sustaining the "propriety" of a jury trial on that basis, namely the decision of Judge Wyzanski in *Jenkins* v. *Roderick*, 156 F. Supp. 299, which followed Judge Magruder's dictum in his opinion in the case of *Doucette* v. *Vincent*, 194 F. 2nd 834, an opinion repudiated by this Court to a large extent in *Romero* v. *The International Terminal Operating Co.*, 358 U. S. 354. As Judge Wyzanski indicated, the question was not the *right* of a seaman to such a jury trial but the "propriety of allowing a jury trial".

The practice of the various circuits, including the Second Circuit, of allowing a jury trial of a claim for *unseaworthiness* joined with a Jones Act claim cannot justify the same procedure with respect to a claim for maintenance and cure and the strong reasons which sustain the one are

not applicable to the other. As this Court said in *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221, in holding that a short state statute of limitations should not bar an unseaworthiness claim joined with a Jones Act claim "if the seaman is to sue for both unseaworthiness and Jones Act negligence he must do so in a single proceeding" (as distinguished from a maintenance and cure claim), or risk a "bar" to a subsequent action for the same injuries, because these claims are but alternative grounds of recovery for "a single cause of action". A maintenance and cure claim is an entirely separate cause of action comprising elements unrelated to tortious conduct or proper and safe equipment and vessel.

There is no conflict between the Court of Appeals decision in the case at bar and *Mitchell* v. *Trawler Racer, Inc.*, *supra*. Clearly, the discussion of Judge Magruder in that case is dicta, since no error was claimed by any of the parties with respect to the allowance of a jury trial of a pendent maintenance and cure claim. In fact, he conceded that the parties did not have a "right" to a jury trial merely because a "pendent claim is joined with a claim under a Jones Act". His discussion simply suggested that in such a case a jury trial already had was not invalid or improper.

The discussion of Judge Magruder in *Mitchell* v. *Trawler Racer Inc.* of general principles does not present a conflict warranting certiorari. As stated in Stern and Gressman's Supreme Court Practice, Second Edition, page 110, a conflict "means that there must be a real conflict on the same matter of law or fact not merely an inconsistency in dicta or in the general principles utilized". In fact, the dissent in the case at bar admits that "Actual decision is scanty to the point of nonexistence".

Normally, the question of pendent jurisdiction arises when in its absence a District Court would not have any

jurisdiction of the pendent claim at all, but with respect to a maritime claim a district court always has "admiralty and maritime jurisdiction" under Article III of the Constitution, and no pendency is needed to confer power on the District Court to decide such a claim. Consequently, the only role that a "pendent" label might have, when attached to a general maritime claim joined with other claims, would be its use as a makeweight created to support a discretionary policy rather than an absolute right to a mode of trial. The dissent's "unitary" approach is another label designed to achieve the same result, but cannot confer the absolute "right" that the dissent advocates. The exercise of that discretion may not be rigid. It depends upon various fact patterns which cannot be resolved by reviewing this case, particularly when its application is made moot by the dismissal of the other claims.

Moreover, the "unitary form of approach" advocated by the dissent as requiring a jury trial as of "right", and not as a matter of discretion, on the basis of "practical convenience" is now academic as is the "pendent" approach, since the jury verdict has in fact extinguished the Jones Act and unseaworthiness claim (a result sustained by all of the Circuit Judges). A review of an asserted "pendent" or "unitary" right to a jury trial of the maintenance and cure claim unaccompanied by any other claim to which it can now be "pendent" or with which it can now be "unitary" would be mere formalism unsupported by "practical convenience" or any other "logical" consideration.

Finally, even if the law of Mitchell allowing the trial judge in his discretion to submit a maintenance and cure claim to the jury was applied here, a different result would not have followed. The trial judge even under Mitchell

could not have been held in error, absent an abuse of discretion. In reverse order, if the trial judge had granted a jury trial, under the law of Mitchell, there would be no basis for a reversal.

Thus, no matter what action was taken by the trial judge in the case at bar with reference to submitting the maintenance and cure claim to the jury, neither party could point to Mitchell to support a charge of reversible error. Accordingly the "pendent jurisdiction" question is academic and this Court should not be used as a forum to resolve it.

Petitioner Was Not Denied the Right to Submit to the Jury His Jones Act Claim for Aggravation of His Injuries.

It is the petitioner's contention that the Court, by withholding the maintenance and cure claim, i.e. the second cause of action, from the jury, precluded him from obtaining a jury determination of his Jones Act claim for damages arising from the defendant's alleged failure to provide proper medical care and maintenance and cure.

It is admitted in the petition that no evidence on this claim was offered by petitioner. He explains this omission by stating that he was merely following the Court's direction that it would hear testimony on the maintenance and cure claim (i.e. second cause of action) after the jury had rendered a verdict. It is quite obvious that the Court was referring only to testimony on the second cause of action and the petitioner was free to present his evidence to the jury on the Jones Act issue for failure to provide proper medical care and maintenance and cure.

The entire panel of the Court of Appeals *in banc* apparently concluded that the ruling of the trial court did not restrict the offering of evidence to the jury with respect to this part of petitioner's case.

THERE WAS NO REVERSIBLE ERROR COMMITTED BY THE TRIAL JUDGE IN EXCLUDING CERTAIN EVIDENCE OFFERED BY THE PETITIONER.

There is also no reason for reviewing the petitioner's contention, similarly rejected by the entire panel, that the district court erred in excluding certain conversations with fellow employees, when the trial judge had discretion to exclude those conversations for remoteness. This is obviously a question of evidence which does not call for review by the Court, although cleverly couched in the petition as a question involving a "proper jury trial".

This evidence question presents no unique and important question of federal law. Certainly, it would not appear to be the function of this court to review the minutia involved in general questions of evidence and to create by decision a model code of evidence for the trial courts or grist for the Wigmore mill.

CONCLUSION.

The petition fails to show that there is any question of importance which is in the public interest for this Court to decide or that there is lack of uniformity in the decisions of the Circuits as to warrant the granting of a writ of certiorari. The petitioner should not be permitted to use this Court as a forum for another hearing.

Respectfully submitted,

MATTHEW L. DANAHAR,
Attorney for Respondent.

CHARLES N. FIDDLER,
JOSEPH R. KELLEY,
Counsel.

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Supreme Court of the United States

October Term, 1962

Docket No. 463

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MARTIN, Deceased,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

BRIEF OF PETITIONER, THOMAS I. FITZGERALD, PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF ANDRES SAN MARTIN, DECEASED

THEODORE H. FRIEDMAN
Counsel for Petitioner
1501 Broadway
New York, N. Y.

JACOB RASSNER
Attorney for Petitioner
15 Park Row
New York, N. Y.

THEODORE H. FRIEDMAN
JACOB RASSNER
BENJAMIN GLICKMAN
EVE M. PREMINGER
of Counsel.

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Currie, The Silver Oar and All That: A Study of the Romero Case, 27 U. Chi. L. Rev. 1 (1959) ... 7, 8, 11, 13, 15, 21, 23, 29

Gilmore & Black, The Law of Admiralty (1957) ... 24

Kurland, The Romero Case and Some Problems of Federal Jurisdiction, 73 Harv. L. Rev. 817 (1960) . 6, 8, 24

5 Moore's Federal Practice 284 (2d Ed. 1951) . 8, 22, 24, 32-33

Note, The Supreme Court, 1958 Term, 73 Harv. L. Rev. 138 (1959) ... 8, 9-10, 25

Supreme Court of the United States

October Term, 1962

Docket No. 463

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MARTIN, Deceased,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

BRIEF OF PETITIONER, THOMAS I. FITZGERALD, PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF ANDRES SAN MARTIN, DECEASED

Opinions Below

The opinion of the Court of Appeals, *in banc*, is reported at 306 F. 2nd 461, and also appears at R. 60-89. The opinion and findings of fact and conclusions of law of the District Court are not reported, and appear at R. 47-58.

Jurisdiction

The judgment of the Court of Appeals was entered on June 29, 1962.

Petition for certiorari was filed on September 26, 1962 and granted on December 10, 1962.

The jurisdiction of this Court has been invoked under 28 U. S. C. Sections 1254(1) and 2101(c).

Question Presented

This Court granted certiorari limited to the following question:

Does a seaman have a right to a jury trial on a claim for unpaid maintenance and cure when joined with a claim for Jones Act negligence? (R. 92)

Statement

Petitioner's intestate, Andres San Martin, claimed that he was in good health prior to the accident of November 5, 1954 aboard respondent's vessel, except that he had a cardio-vascular aneurysm (an enlargement of the major blood vessel leaving the heart) which was entirely non-disabling and which would have remained so but for the accident (R. 4, 16, 20, 23, 51).

The accident occurred when San Martin lost his balance on an inclined, insecure gangway (R. 19-20, 33, 34-35), attached at one end to rollers to a pier and at the other to the ship floating in and moving with the harbor waters. At that time, he was carrying, by order of his superior, a 100 lb. drum of cement (R. 14, 16) up the inclined gangway without any assistance. San Martin contended that this procedure was improper and dangerous (R. 21) and that instead of manually carrying the goods aboard, a pallet, skid or platform, attached to the ship's winches (R. 19), should have been used to lift the goods mechanically from the pier to the ship's deck.

The complaint asserted Jones Act negligence, unseaworthiness of the vessel, and a separate cause of action for

unpaid maintenance and cure and earned wages (R. 2-4), and was given a civil side index number (R. 5).[1]

A jury demand as to all causes of action had been duly endorsed on the original complaint (R. 2). At the outset of the trial, following inquiry by the court, San Martin's counsel argued orally that an action for maintenance and cure was a common law action that existed prior to the establishment of the admiralty jurisdiction of the Federal Court, that the claims relating to maintenance and cure could have been brought in the State Court where petitioner would unquestionably have had a jury trial, and that a jury trial should be granted under the doctrine of "pendent jurisdiction" (R. 8-9).

Counsel's position was rejected in entirety by the trial judge, and prior to the receipt of any evidence, the trial

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[1] The respondent never moved to dismiss the maintenance and cure cause of action for lack of jurisdiction on the civil side, see *Paduano* v. *Yamashita Kisen Kabushiki Kaisha*, 221 F. 2d 615 (2nd Cir. 1955), or to have it transferred to the admiralty side of the District Court. See *Catherall* v. *Cunard S.S. Co.*, 101 F. Supp. 230, 234 (S. D. N. Y. 1951); see, also, *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437, 443 (2nd Cir. 1959), cert. den. 359 U. S. 1000 (1959).

Instead, the respondent allowed the maintenance and cure claim to stand unchallenged on the civil side of the District Court, appended to the Jones Act claim, from the time of filing in 1955 to the time of trial in 1960, and employed all of the pre-trial discovery proceedings available to it on the civil side with regard to the petitioner's contentions in both causes of action. Many of these pre-trial procedures, including pre-trial discovery depositions of the petitioner taken by the respondent, would not have been available to the respondent with regard to the allegations relevant to the maintenance and cure claim, had that claim proceeded under the Admiralty Rules. *Miner* v. *Atlass*, 363 U. S. 641 (1960).

Having enjoyed all the pre-trial benefits of treating the maintenance and cure claim as a "civil" matter, respondent, at the moment of trial, took the opposite tack and supported the trial judge's view that the maintenance and cure claim must be treated as one in Admiralty and triable to the court without a jury.

judge directed that all issues relating to maintenance and cure be tried to the court, stating:

> "and if there is any additional testimony necessary, I will hear that after the jury has rendered its verdict." (R. 8)

San Martin presented proof to the jury that the excessive work duty of November 5, 1954, the danger of which he complained and brought to the attention of his superior (R. 21), caused a disabling back injury (R. 20, 23, 27-28, 35), later diagnosed as a herniated disc (R. 49, 50), and aggravated his dormant cardio-vascular condition and rendered it disabling (R. 51-52).

The trial judge submitted 12 separate interrogatories to the jury under a Special Verdict (R. 44-46) including computations of income taxes (R. 45) and computations involving percentage deductions for contributory negligence (R. 46). The jury did not reach the mathematical problems involved because they returned a verdict for defendant on the issue of the negligence of the superior's order and the unseaworthiness of the vessel (R. 44).

The trial judge dismissed the jury and received additional evidence on the maintenance and cure count, specifically as to what further medical treatment San Martin required. On this issue, San Martin presented several physicians, including the former Chief of the Orthopedic Service of the very U. S. P. H. S. Hospital from which San Martin had been discharged as an in-patient, marked "Not Fit For Duty" (R. 50-51). San Martin's physicians testified that he was at the time of that discharge and through to the time of the trial in need of medical care for his back (R. 50-51), for his cardio-vascular condition (R. 51-52, 53) and for his congestive heart failure (R. 53) which was imperiling his life.

The trial judge chose to disbelieve San Martin's physicians on the need for further care (R. 56) and on the existence of congestive heart failure (R. 55) and denied recovery for any period after March 1, 1955, the date of

discharge as an in-patient from the U. S. P. H. S. Hospital. On November 6, 1960, five months after the trial judge's decision, San Martin died of congestive heart failure (see R. 58-59, 61).

Summary of Argument

All of the relevant policy considerations of fair, efficient, inexpensive and simple administration of justice favor single jury trial of the maintenance and cure claim with the Jones Act claim, as has been agreed by all of the learned commentators who have written on the subject.

The district courts which have attempted to follow the procedure favored by respondent, *i.e.*, jury trial of the Jones Act claim and court trial of the appended maintenance and cure claim, have found this procedure troublesome, duplicative and unworkable.

The opinion of the Court below, on behalf of only four of the nine members sitting *in banc*, erroneously concluded that "rigidly drawn" Rules 38 and 39, F. R. C. P., prevent granting a jury trial on the appended maintenance and cure claim notwithstanding that such jury trial might well be "desirable".

The maintenance and cure claim is, in fact, intertwined with and "pendent" to the Jones Act claim arising from the same incident and facts, and under such circumstances a single jury trial of both claims may and should be granted.

A seaman's basic right to a jury trial on his appended maintenance and cure claim may and should be fixed and ineradicable at the time he commences suit, and not be subject to the unpredictable discretion of the trial judge, the fortuitous developments of his litigation, or the success or failure of his Jones Act claim, provided only that the Jones Act claim, when filed, is bona fide and does arise out of the same facts, incident and illness involved in the maintenance and cure claim.

POINT I

It is generally agreed that policy considerations of fairness, simplicity and practicality all favor submission of all the seaman's claims arising out of the same incident to the jury.

In *Romero v. Int'l. Term. Oper. Co.*, 358 U. S. 354, 381 (1959), this Court stated:

> "We are not called upon to decide whether the District Court may submit to the jury the 'pendent' claims under the general maritime law in the event that a cause of action be found to exist".

The instant case, on the single specific question upon which this Court granted certiorari (R. 92)

> "Does a seaman have a right to a jury trial on a claim for unpaid maintenance and cure when joined with a claim for Jones Act negligence?"

calls upon the Court now to decide the issue left open in the *Romero* case.[2]

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[2] Of course, the question upon which this Court has granted certiorari herein is not necessarily one of "pendent" jurisdiction. This Court could decide that a seaman has a right to a jury trial on a claim for unpaid maintenance and cure by reconsidering the result reached, by 5-to-4 vote, in *Romero*, where the Court held that claims arising under the general maritime law do not have an independent civil side jurisdictional basis under 28 U. S. C. § 1331.

Thus, this Court could decide the question now before it in the affirmative by holding that a maintenance and cure claim, arising under the general maritime law, is a claim within 28 U. S. C. § 1331, arising under Federal law, and therefore directly entitled to a jury trial. Such result would avoid the burdening of these working men's damage suits with "the harvest * * * (of the) dragon's teeth * * * sown" by the *Romero* decision (Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 Harv. L. Rev. 817, 850; 1960), a fair example of which is the instant matter. It is clear that had the minority prevailed in *Romero*, the instant petitioner would have

(Continued on page 7)

Commentators

In the avalanche of scholarly discussion that followed this Court's decision in *Romero* v. *Int'l Term. Oper. Co.*, 358 U. S. 354 (1958), several commentators offered their own answers to the question left open in *Romero* and presently before this Court. Without exception they decided that considerations of fairness, efficient administration of justice, speedy and inexpensive trials, simplification of issues and procedure dictated the submission of all of the seaman's claims to the jury.

After an exhaustive analysis of the topic, Professor Brainard Currie (*The Silver Oar and All That: A Study of the Romero Case*, 27 U. Chi. L. Rev. 1, 58, 63, 64; 1959), stated:

> "• • • the fairest and most efficient procedure is not to reserve the maintenance and cure count (to the court alone) but to submit it to the jury along with the major counts for damages." (p. 58)

• • •

(Continued from page 6)

been entitled as a matter of right to a jury trial of his maintenance and cure claim. See 358 U. S. at 389-390, 393, 413-414; Brennan, J., dissenting in an opinion joined by Chief Justice Warren and Justices Black and Douglas.

Petitioner has not here briefed the complex issues that would be involved on a reconsideration of the *Romero* opinion. Several of the authorities herein cited have, however, dealt comprehensively with the issues raised by the *Romero* decision. See Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. Chi. L. Rev. 1 (1959); Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 Harv. L. Rev. 817 (1960); Note, *The Supreme Court, 1958 Term*, 73 Harv. L. Rev. 138 (1959).

In the event this Court is willing herein to give reconsideration to the matter dealt with in *Romero*, it is respectfully submitted that it may desire to direct reargument and submission of further briefs, the precise procedure followed when *Romero* was first before this Court. See 356 U. S. 955 (1958).

> "When a Jones Act claim is submitted to the jury, the appended claims for unseaworthiness and maintenance and cure ought also to be submitted (to the same jury)." (p. 63)
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> "• • • there is no reason why all three counts should not be submitted to the jury, irrespective of the amount involved in the maintenance and cure count itself". (p. 64)

Professor Kurland (*The Romero Case and Some Problems of Federal Jurisdiction*, 73 Harv. L. Rev. 817, 850; 1960), urged that:

> "• • • the mode of trial should be resolved in the way 'most conducive to the just, speedy and inexpensive disposition of the business of the courts' • • • (and) when the question is ultimately resolved it should be in favor of a single jury trial for all the claims (i.e. negligence, unseaworthiness and maintenance and cure)".

Similarly, Professor Moore had previously stated that (5 Moore's Federal Practice 284; 2d Ed. 1951):

> "When a seaman has been injured his total claim should not be butchered up. He should be able to put it forward either wholly in admiralty without any right of jury trial, or wholly at law with the right of jury trial on all the issues".

Basing their affirmative answer on the doctrine of "pendent jurisdiction", the Harvard Law Review stated (73 Harv. L. Rev. 141 at 143 (1959)):

> "In awarding maintenance and cure, a judge must make allowance for sums awarded by the jury on the Jones Act count for lost wages and medical expenses to the end of the voyage. Whether maintenance and cure for other purposes constitutes a separate cause of action is immaterial; to give all three claims to the jury eliminates much confusion and simplifies the

trial, avoiding the necessity of special verdicts and minimizing the danger of inadequate or overlapping awards."

Judicial Decisions

In *Jenkins* v. *Roderick*, 156 F. Supp. 299 (D. Mass. 1957), Judge Wyzanski was faced with the same issue as is herein involved; whether or not to grant a jury trial on a maintenance and cure claim appended to a Jones Act and unseaworthiness claim. There was no diversity of citizenship between the parties. The plaintiff seaman had filed a civil action against the defendant ship owner. The plaintiff sought, as here, a jury trial as to all of his claims, including the one for maintenance and cure.

Judge Wyzanski reviewed the relevant law and concluded, in advance of this Court's decision in *Romero, supra*, that civil side jurisdiction for the maritime claims of unseaworthiness and maintenance and cure could not be based on 28 U. S. C. § 1331 as matters "arising under the laws of United States" (156 F. Supp. at 300-304).

Judge Wyzanski, nevertheless, concluded that the plaintiff was (156 F. Supp. at 304):

> "entitled to go to the jury on (the unseaworthiness) count because it is pendent to a Jones Act count."

As to the maintenance and cure claim, similarly appended to the Jones Act claim, Judge Wyzanski wrote an incisive analysis of the problems and policy considerations involved (156 F. Supp. at 304-306) and concluded (156 F. Supp. at 306):

> "• • • upon the request of any party to a maintenance and cure controversy, the proper course is for the judge to allow the jury to consider the maintenance and cure count with the Jones Act and unseaworthiness count."

Judge Wyzanski based his conclusion that the maintenance and cure claim, when appended to a Jones Act claim, should be submitted to the same jury on considerations of "pendent jurisdiction" (156 F. Supp. at 304).

He noted that the procedure of submitting the appended maintenance and cure claim to the same jury along with the Jones Act and unseaworthiness counts "has strong practical advantages", for (156 F. Supp. at 304):

> "The basic facts essential to a maintenance and cure recovery are all usually included within a Jones Act or an unseaworthiness recovery. That is, on a Jones Act or unseaworthiness count the seaman may and ordinarily does show his contract relationship, his hospital and medical bills, and (as a guide to ascertaining earning capacity) his rate of wages and maintenance."

The opinion discussed in detail the problems that arise if the District Court judge attempts to determine the maintenance and cure count by himself while submitting the Jones Act claim to the jury, and pointed out that in such instances (156 F. Supp. at 305):

> "* * * the Court does not know whether the jury has reduced plaintiff's recovery on account of contributory negligence, * * * nor whether if the jury has allowed for diminution of earning capacity it has fixed a terminal date nearer the day of the accident than the last day on which maintenance would be due, nor whether the jury has allowed for hospital and doctors' bills paid by third persons, an item which possibly may be recoverable under a Jones Act count * * * even when it is not recoverable on a maintenance and cure count."

Judge Wyzanski referred to "other examples of possible duplication and doubt" (156 F. Supp. at 305) and stated that while a District Court "judge could take steps to avoid

this uncertainty" (156 F. Supp. at 305) by putting to the jury special interrogatories (156 F. Supp. at 305):

> "even then he might have inadequate data to know how much additional maintenance could be awarded without duplication."

Judge Wyzanski stated flatly on the very issue now before this Court that (156 F. Supp. at 305):

> "It is not a satisfactory way of avoiding this dilemma for the judge to keep for himself the decision on cure and maintenance",

and concluded that fair and proper procedure called for allowing (156 F. Supp. at 306):

> "• • • a jury trial on all three counts (Jones Act negligence, unseaworthiness, and maintenance and cure) of the complaint."

Professor Currie, *op. cit.*, 27 U. Chi. L. Rev. at 58, commented on Judge Wyzanski's opinion in *Jenkins*:

> "It is sufficient to note that this careful examination of the problem by an experienced and thoughtful district judge leaves no doubt that the fairest and most efficient procedure is not to reserve (to the Court alone) the maintenance and cure count but to submit it to the jury along with the major counts for damages."

In the First Circuit, the conclusion reached by Judge Wyzanski in *Jenkins* is now apparently the standard procedure. See *Mitchell* v. *Trawler Racer, Inc.*, 265 F. 2d 426, 427-429 (1959), *rev'd on other grounds*, 362 U. S. 539 (1960).

In the Second Circuit, the similar question of whether a claim for *unseaworthiness* joined with a Jones Act claim should be submitted to the jury with the Jones Act claim or reserved to the Court has been decided in favor of single

jury determination. *Bartholemew* v. *Universe Tankships Inc.*, 263 F. 2d 437 (2d Cir. 1959), *cert. denied*, 359 U. S. 1000 (1959). This result was based on three alternative grounds discussed by the majority and concurring opinions. As pointed out by the dissenters in the instant case (306 F. F. 2d at 476, R. 84-85), each of these reasons applies with equal vigor to the submission to the jury of an appended maintenance and cure claim.

The majority in *Bartholomew* held (263 F. 2nd at 447):

> "the Jones Act claim as alleged is so factually intertwined with the maritime (unseaworthiness) claim as to carry it along into the civil side of the District Court for trial with the Jones Act claim to a court and jury".

In an extensive opinion (263 F. 2nd at 443-447) analyzing the possible "complications and injustice" (263 F. 2nd at 446) were any other result to obtain, the court held that a joint jury trial of the Jones Act and unseaworthiness claim was required, principally on the basis of a "pendent jurisdiction" theory (263 F. 2nd at 445, 446, 447).

As will be hereinafter demonstrated (Point II, *infra*), the maintenance and cure claim is also thoroughly "intertwined factually" (263 F. 2nd at 446) with the Jones Act claim, to the extent that separate determination of these claims creates numerous problems of possible overlapping recoveries, doubtful assignments of burden of proof, extensive but necessarily incomplete special interrogatories of juries, and troublesome issues of collateral estoppel.

POINT II

The practice of splitting up the seaman's claims between the court and the jury has proved unworkable.

Prior to a contrary holding in *Jordine* v. *Walling*, 185 F. 2d 662 (3 Cir. 1950), it was the established practice in the several circuits to submit maintenance and cure claims to the jury along with Jones Act claims as a matter of course. See cases cited at Currie, *op. cit.*, 27 U. Chi. L. Rev. at 58, fn. 318-323; Instant Case, 306 F. 2d at 473, 477-478 fn. 3; R. 79, 87 fn. 3.

Promptly after *Jordine*, various able and experienced district judges indicated that they were disturbed by its result because of their satisfactory experience with a single determination of all claims by the jury. See *McDonald* v. *Cape Cod Trawling Corp.*, 71 F. Supp. 888, 890-2 (D. Mass. 1947, Wyzanski, *J.*); *Catherall* v. *Cunard S.S. Co.*, 101 F. Supp. 230, 233-4 (S.D.N.Y. 1951, Kaufman, *J.*); *La-Fontaine* v *The G. M. McCallister*, 101 F. Supp. 826, 827-8, fn. 1 (S.D.N.Y. 1951, Weinfeld, *J.*). Judge Wyzanski pointed out (71 F. Supp. at 891) that application of the doctrine of pendent jurisdiction would resolve the problems created by the *Jordine* decision, but indicated that his right to invoke that doctrine must await the direction of this Court.

In attempting to administer the *Jordine* rule of splitting up the seaman's claims between the court and the jury, the courts have found themselves beset with problems arising out of possible overlapping recoveries, complicated by possible jury reduction of Jones Act verdicts for contributory negligence, and have arrived at conflicting decisions on how to proceed in the morass thus created.

In *Claudio* v. *Sinclair*, 160 F. Supp. 3 (E.D.N.Y. 1958) the district court applied, with some misgiving (see 160 F. Supp. at 4-5 fn. 1), the *Jordine* doctrine, and held that the maintenance and cure claim, though coupled with a Jones Act claim, could not be tried to jury but was re-

quired to be decided by the "Court sitting in Admiralty" (160 F. Supp. at 4). The court then held, after a jury verdict and award of damages for the seaman on the Jones Act claim, that a further recovery on the maintenance and cure claim was *not* precluded, and justified this position stating (160 F. Supp. at 5):

> "* * * the Court instructed the jury that any recovery to which plaintiff was entitled was to be reduced in proportion to his contributory negligence. Conceptions of contributory negligence have no bearing upon, nor is contributory negligence a defense against, liability for maintenance and cure. The plaintiff may not have recovered the full value of his lost wages, and there is no way in which the defendant can show any specific duplication of damages."

In *Lazarowitz* v. *American Export Lines*, 87 F. Supp. 197 (E.D. Pa. 1949) the court reached a contrary result. After the jury found for the plaintiff on the Jones Act claim, the court denied recovery on the maintenance and cure claim it had reserved to itself on the ground that there was no way of determining how much duplication would exist in two awards.

In *Stendze* v. *The Boat Neptune, Inc.*, 135 F. Supp. 801 (D. Mass. 1955, Aldrich, *J.*) the district court went both ways on the manner of determining a maintenance and cure claim reserved to the court and tried simultaneously with a jury trial on an unseaworthiness claim. The court noted (135 F. Supp. at 802):

> "The verdict of the jury for all damages for loss of earnings and for pain and suffering . . . was plainly inadequate except for the fact that there was substantial evidence of contributory negligence, which I instructed the jury would require to proportion the damages if found . . . I think it is clear that this is what they did. Hence the plaintiff has not received all of the . . . lost earnings nor can it be told how much he has received since damages for

> pain and suffering were not liquidated. This is an insuperable obstacle for the defendant (on the issue for establishing the existence of possible duplicate recovery by way of additional award for maintenance and cure). . . . However, the defendant cannot show the specific duplication, and accordingly must fail for want of proof."

Notwithstanding, this decision, the district court "awarded a sum for medical bills and for maintenance, but nothing for wages, which means he cast upon the plaintiff the unsustainable burden of showing the amount which the jury has awarded for wages." Currie, *op cit.*, 27 U. Chi. L. Rev. 1 at 44.

As stated by Professor Currie with regard to the *Stendze* case in particular, and the problem here being reviewed in general (*op. cit.*, 27 U. Chi. L. Rev. at 44-5):

> "If both counts (i.e. unseaworthiness and maintenance and cure) had been submitted to the jury with proper instructions, it seems less likely the plaintiff would have been deprived of the modest protection afforded him by the principle of maintenance and cure."

The only appellate discussion of the effect of possible contributory negligence and jury reduction of the Jones Act award on the court's disposition of the maintenance and cure count occurred in *Bartholomew* v. *Universe Tankships, Inc.*, 279 F. 2d 911 (2d Cir. 1960). The court there noted but declined to resolve the questions of deduction, assignment of burden of proof and duplication of recoveries (279 F. 2d at 918).

It should be added that the problems of duplication of recovery are not restricted to those arising out of possible reduction of jury verdicts because of the seaman's contributory negligence.

As Judge Wyzanski explained in detail in *Jenkins* (156 F. Supp. at 305), even "with answers to such questions",

i.e., what percentage of the damages were caused by plaintiff's contributory negligence", he (the District Judge) might have inadequate data to know how much additional maintenance could be added without duplication."

In *Bartholomew* v. *Universe Tankships, Inc.*, 279 F. 2d 911 (2d Cir. 1960), an assault case where considerations of contributory negligence were not a factor, see 168 F. Supp. 153, 155, 160 (S. D. N. Y., 1957), the Court of Appeals noted that the plaintiff seaman withheld from the jury, as he was entitled to (279 F. 2d at 917),

> "proof of the cash value of board and lodging and the instruction to the jury did not include this item as part of the seaman's damages for loss of wages. (Accordingly) a later allowance for board and lodging as maintenance will not constitute double payment or duplication."

The Court of Appeals, therefore, remanded the case to the District Court judge for further proceedings, in which the trial judge was to decide whether or not evidence of cost of board and lodging while ill and receiving beneficial medical care had been presented to the jury, and if not the trial court was to undertake further proceedings to determine these issues and make an appropriate maintenance and cure award.

Obviously, had the maintenance and cure count been submitted initially to the jury, evidence as to the cost of plaintiff's board and lodging during the relevant period would have had to have been submitted along with all other proof of his damages, and the jury's general verdict would have determined the case in a single award rendered at the conclusion of its deliberations.

It is noteworthy of the confusion caused by separating the trial of the maintenance and cure claim from the Jones Act claim to compare *Runyan* v. *Great Lakes Dredge & Dock Co.*, 141 F. 2nd 396 (6th Cir. 1944), where the Court held the seaman estopped from bringing a maintenance and cure

action because of a prior Jones Act recovery, with *Smith* v. *Lykes Brothers-Ripley S.S. Co.*, 105 F. 2nd 604 (5th Cir. 1939), *cert. den.* 308 U. S. 604 (1940), holding to the contrary.

Examples of "possibilities of duplication and doubt" (*Jenkins* v. *Roderick*, 156 F. Supp. at 305) abound. Thus, if a plaintiff has alleged two injuries (*e.g.*, a fractured nose and headaches due to a post-concussion syndrome, both coming from a single blow on the head when a block fell from above), the jury might determine that the shipowner was liable (see *Johnson* v. *United States*, 333 U. S. 46 (1948)); and credit the plaintiff's physicians on the claim of fractured nose, but disbelieve the plaintiff's physicians as to the less demonstrable claim of headache. Unless the jury was interrogated not only as to the percentage of contributory negligence found and the amount allowed for medical and hospital expenses, loss of earnings, pain and suffering (see *Jenkins* v. *Roderick*, 156 F. Supp. at 305), but further as to which of the plaintiff's injuries the jury found did occur, the trial court would be unable to proceed accurately on the reserved maintenance and cure claim. If the trial court does not interrogate the jury as to which of the injuries it allowed damages for, it might grant the plaintiff maintenance and cure for cost of board, lodging and medical treatment related to both the alleged injuries, although the plaintiff submitted his allegations as to two conditions to the jury and was disbelieved by the jury as to one.

Nor can it be assumed that merely knowing the amount the jury gave for the medical expenses would provide the necessary information. If the plaintiff had used two or three physicians to treat the disputed injuries, the jury may have discarded the claim for the cost of one or two of the physicians, finding the expense thereof as not being necessary, and thus have allowed less on the claim for medical expenses, and yet have been persuaded by the plaintiff that the period of his disability (and right to

maintenance) was extensive and that he did indeed suffer both claimed injuries.

Even a defendant's verdict on the Jones Act claim does not resolve the collateral estoppel and assignment of burden of proof problems involved in determining the reserved maintenance and cure count. Where both basic issues are contested—*i.e.*, the existence of negligence or unseaworthiness, and the occurrence of any illness or injury—a defendant's verdict on the Jones Act claim could be based on a negative finding on either of the two questions. However if the defendant's verdict on the Jones Act claim is based solely on a negative finding to the first question, the seaman is still entitled to receive maintenance and cure for whatever illness or injury arose during the ship's service, and the trial judge will not know on which ground the jury made its verdict. On the other hand, if in fact the jury's verdict for the defendant was based on a negative finding on the latter question, the seaman should be estopped from receiving maintenance and cure.

Clearly where the jury has found against one of the parties on any issue, that result is binding, notwithstanding that the same issue is also relevant to the court-reserved maintenance and cure claim. *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500 (1959); *La Fontaine v. G. M. McAllister*, 101 F. Supp. 825, 828 (S. D. N. Y., 1951).

As all of the discussion and examples above referred to demonstrate, factual intertwining on the issue of damages —and even on the issue of liability, *i.e.*, the existence of any injury—with the Jones Act claim is clearly present. While it is conceded by the petitioner that a maintenance and cure claim and a Jones Act claim are not identical, it is respectfully submitted that it has been sufficiently demonstrated that they are highly intertwined, and that just, efficient and expeditious administration of justice compel that both claims be tried to the same trier of fact and at the same time, when arising from the same incident and injury.

If is obvious that an affirmative answer by this Court to the question upon which it has granted certiorari presents a clear solution to the specific problems discussed above. Maintenance and cure claims would be submitted to the jury with the Jones Act claim and the jury instructed as to all of the items of damage: cost of beneficial medical care (cure); cost of the seaman's board and lodging while in need of beneficial medical care (maintenance); wages to the end of the voyage, which are the three elements of a maintenance and cure claim (see *Pacific Steamship Co.* v. *Peterson*, 278 U. S. 130 [1928]; *Bartholomew* v. *Universe Tankships, Inc.*, 279 F. 2d 911, 914-5 (2d Cir. 1960); *La Fontaine* v. *The G. M. McAllister*, 101 F. Supp. 825, 828 [S. D. N. Y. 1951]). These were the three items sought in the second cause of action in the instant case which were taken from the jury and reserved for trial to the court (R. 4, 8).

Instructions to the jury as to these items of damage along with instructions as to the principles of liability relating to maintenance and cure, together with the direction to the jury that no reduction in the award, if any, should be made as to the three items constituting maintenance and cure on the ground of contributory negligence of the plaintiff, if any, is all that would be required. With these instructions, and the other relevant instructions as to the different rules of liability under the Jones Act and seaworthiness doctrines and maintenance and cure, the jury would be capable of rendering a single simple result in a seaman's personal injury action, and by so doing eliminate all of the problems of possible duplication and overlapping and assignment of burden of proof which have beset the District Court judges in the cases hereinabove cited and have resulted in an unresolved conflict in the various courts that have discussed those issues.

POINT III

The learned Court below erred in overlooking the strong policy considerations in favor of jury trial.

In denying the seaman's right to a jury trial on his appended maintenance and cure claim, the court below did not expressly or impliedly indicate disagreement with the serious policy considerations discussed in Points One and Two, *supra*. However, Judge Friendly, on behalf of four members of the *in banc* Court, held that a district judge could not, under any circumstances, "submit to the jury for final determination a claim for maintenance and cure which has been joined with (a substantial claim under the Jones Act" (306 F. 2d at 469, R. 72). In this respect, Judge Friendly spoke for a minority of the court, for three judges held that "jury trial of joined claims for maintenance and cure was here required" (306 F. 2d at 469, 475-478; R. 72, 83-88), and two others concurred in the result only by holding that the trial "judge has discretion to submit to the jury a claim for maintenance and cure arising out of the same event as the Jones Act claim" (306 F. 2d at 469, 478; R. 72, 88-89).

Judge Friendly's position that jury trial as to the maintenance and cure claim is absolutely barred is based on the contentions:

(a) That Rules 38 and 39 of the Federal Rules of Civil Procedure do not provide for such jury trial, and their failure to do so is fatal to the claim;

(b) That maintenance and cure claims are totally different than Jones Act and unseaworthiness claims and, accordingly, the concept that such claim is "pendent" to the Jones Act claim and on that basis entitled to a jury trial is inapplicable.

(a) Federal Rules of Civil Procedure 38 and 39

Judge Friendly states that F.R.C.P. 18(a), which lists the situations where civil claims may be joined *does not* operate to exclude the joinder of maritime claims "which the Courts already permitted" (306 F. 2d at 469, R. 72). Yet he then asserts that F.R.C.P. 38 and 39, which list the situations where jury trial may be had of civil claims, *does* operate to exclude jury trial of maritime claims which he later concedes were also formerly permitted by the courts (306 F. 2d at 473, R. 79). See also, Currie, *op cit* 27 U. Chi. L. Rev. at 58 fn. 318-323.

In justifying this application of the Federal Rules of Civil Procedure solely to joinder of the maintenance and cure claim, Judge Friendly cited several cases from other Circuits and noted that "in the (Second) Circuit claims for maintenance and cure have long been joined with Jones Act claims, apparently, as here, without objection, even when there was no diversity" (306 F. 2d at 469 fn. 7; R. 72-73 fn. 7).

Thus, a prior "long practice" of joinder was held by Judge Friendly as sufficient to broaden the language of F.R.C.P. 18(a) to include maritime claims and wipe away the barrier of inapplicability of the Federal Rules of Civil Procedure to admiralty proceedings explicitly stated in R.R.C.P. 81(a)(1). It is hard to understand why the similar "long practice" of submission of maintenance and cure claims to a jury, when such claims are appended to a Jones Act claim, does not justify that procedure and effect a broadening, if such be necessary, of the provisions of F.R.C.P. 38 and 39.

Interestingly, each one of the Court of Appeals cases cited by Judge Friendly in his footnote supporting permissibility of joinder (306 F. 2d at 469 fn. 7, R. 72-73 fn. 7) in which juries were demanded involved not merely a joinder, on the civil side, for procedural purposes, of the maintenance and cure claim with the Jones Act claim, but

an actual submission of the maintenance and cure claim to the jury, along with the Jones Act claim. It is noteworthy that in one of the cases inexplicably cited with approval by Judge Friendly, *Nolan* v. *General Seafoods Corp.*, 112 F. 2d 515, 516 (1st Cir. 1940).

> "... the trial judge directed a verdict for the defendant on the first (Jones Act) count and submitted the case to the jury on the second (maintenance and cure) count."

This result obviously involves a complete acceptance of petitioner's contention that once the maintenance and cure claim is appended to the Jones Act claim, the seaman's right to a jury trial on the maintenance and cure claim becomes fixed and continuous, regardless of the outcome of the Jones Act claim, provided merely that the initial Jones Act claim was substantial and bona fide and not colorable. This was precisely the court's holding in *Lindquist* v. *Dilkes*, 127 F. 2d 21, 25 (3rd Cir. 1942), also cited with approval by Judge Friendly below in the aforementioned footnote.

Nevertheless, Judge Friendly concluded, on the basis of Rules 38 and 39 of F. R. C. P., that a seaman could not be entitled to a jury trial on the maintenance and cure claim, notwithstanding appendage to a related, substantial Jones Act claim; a point on which five of his brethren in the Court of Appeals differed with him, three having held that in the circumstances a jury trial must be provided, and two more having held that it was at least discretionary with the trial judge.

Also, directly in disagreement with Judge Friendly and his three colleagues below on this point is Professor Moore, and the numerous decisions cited in his treatise, all to the effect that F.R.C.P. 38 and the Federal Rules of Civil Procedure, (5 *Moore's Federal Practice* 40, 41; (2d Ed.):

> "Neither enlarge nor restrict the right to jury trial . . .

> This principle of no enlargement nor restriction (by the Rules) of the right of jury trial has received complete judicial approbation."

Furthermore, the statutory section (28 U. S. C. § 2072) authorizing the rule-making procedure in the federal courts specifically states that the Federal Rules of Civil Procedure cannot in any way abridge the right to a jury trial. See also, *Beacon Theatres Inc.* v. *Westover*, 359 U. S. 500, 509 fn. 15 (1959).

It would be hard to understand why this Court, in *Romero* v. *Int'l. Term. Oper. Co.*, 358 U. S. 354, 381 (1959) and in *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 331 fn. 4 (1960), would have specifically referred to the question of whether or not to invoke the doctrine of "pendent" jurisdiction to support submission to a jury of claims under the general maritime law when appended to a Jones Act claim as being left open, if the possibility of such submission were clearly barred by the language of Rules 38 and 39 of the F. R. C. P., as Judge Friendly claims.[3]

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[3] Thus, Professor Currie, *op. cit.*, 27 U. Chi. L. Rev., at 62-63 has stated:

> "The (Supreme) Court (in *Romero*) has adopted the theory of 'pendent' jurisdiction,' which, in its maritime version, was invented and employed almost exclusively for the purpose of justifying the submission of maritime claims to the jury. It is difficult to believe that the affirmative implication of this holding for the jury question can be without significance".

Nor have any commentators who have carefully examined the instant question ever concluded that the language of F. R. C. P. 38 constitutes a barrier to this Court's determination that considerations of "pendent" jurisdiction favor a jury trial on the maintenance and cure claim in the circumstances.

See,

Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. Chi. L. Rev. 1, 4-6, 41-51, 58-65, esp. 59, 62-63 (1959);

(Continued on page 24)

A final demonstration of the invalidity of the argument that F. R. C. P. 38 and 39 are insurmountable barriers to the petitioner's contention notwithstanding the policy reasons in support of petitioner's position, is found by analyzing the decision of the Second Circuit in *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437 (2nd Cir. 1959), *cert. den.* 359 U. S. 1000 (1959).

There the Second Circuit held that considerations of "pendent" jurisdiction justified and required that a jury trial be granted to a seaman on his unseaworthiness claim when appended to a Jones Act claim arising out of the same incident, although diversity of citizenship was not present.

Judge Friendly in his opinion below expressly adopted and approved this *Bartholomew* decision (306 F. 2d at 471, 473-4; R. 76-77, 80).

There can be no question that both unseaworthiness and maintenance and cure claims arise from the general maritime law of the United States. *Romero* v. *Int'l. Term. Oper. Co.*, 358 U. S. 354, 356, 389, 393 (1959); *Pacific SS Co.* v. *Peterson*, 278 U. S. 130, 134 (1928). Compare, particularly, the historical discussion in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 543-549 (1960), as to the origin of the law relating to unseaworthiness claims, with the historical discussion in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 727-730 (1943), with regard to the origin of maintenance and cure claims.

(Continued from page 23)

Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 Harv. L. Rev. 817, 849, 850 (1960);
73 Harv. L. Rev. 138, 142-146 (1959);
5 Moore's Federal Practice 284 (2d Ed. 1951);
Gilmore & Black, The Law of Admiralty 262 (1957).

See also,

Jenkins v. *Roderick*, 156 F. Supp. 299, 304-306 (D. Mass. 1957).

Thus, as Judge Learned Hand stated [*Strika* v. *Netherlands Ministry of Traffic*, 185 F. 2d 555, 558 (2nd Cir. 1950), cert. den. 341 U. S. 904 (1951)]:

> "the obligation of 'maintenance and cure' * * * is concededly quite as entirely the creature of the maritime law as the 'obligation' to furnish a seaworthy ship."

See also *Braen* v. *Pfeifer Oil Transp. Co.*, 361 U. S. 129, 132-133 (1959).

Judge Friendly attempts to justify the apparent conflict between the decision in *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437 (2nd Cir. 1959), *cert. den.* 359 U. S. 1000 (1959), which finds no insurmountable barrier in F. R. C. P. 38 and 39 to granting a jury trial to an unseaworthy claim appended to a Jones Act claim, and his decision in the instant case, denying jury trial to an appended maintenance and cure claim on the basis of those Rules, by asserting that a Jones Act and unseaworthiness claim are "both claims in tort, generally predicated on the same facts and carrying the same measure of damages (and) 'are so intertwined factually that they cannot, as a matter of practice, be separated into pieces'" (306 F. 2d at 471, R. 76).

But if Judge Friendly was willing to avoid the alleged effect of "rigidly drawn" (306 F. 2d at 470, R. 74) Rules 38 and 39, F. R. C. P., to justify submitting an appended unseaworthiness claim to a jury, it cannot logically be contended that the same Rule bars submitting a maintenance and cure claim to a jury.

Judge Friendly's opinion below attempts to turn this corner by setting forth at length the lack of identity between maintenance and cure claims and Jones Act or unseaworthiness claims, ending with an assertion that the claims are "totally different" (306 F. 2d at 472, R. 78).

However, once it is conceded, at least *sub silentio*, that the issue of whether or not to grant a jury trial on a maintenance claim appended to a Jones Act claim turns on whether the claim is "different" or "intertwined" with the Jones Act claim, it is clear that Rules 38 and 39, F. R. C. P., are hardly obstacles to the desired conclusion, and it remains only for this Court to determine as a matter of judicial policy which result it favors.

(b) Intertwining of Maintenance and Cure Claim With Jones Act Claim

The issue of whether or not a maintenance and cure claim is or is not intertwined with the Jones Act and unseaworthiness claims to which it is appended, the policy considerations relating to problems of duplicative and overlapping recoveries, and the difficulty of procedure and assignment of burden of proof if separate trials to jury and judge are required, have been set forth at length at Points I and II, *supra*.

Joint jury trial of the maintenance and cure claim with the Jones Act claim to which it is appended is so clearly favored by all of the policy considerations that have been hereinabove described and by all of the learned commentators who have spoken on the question, that no additional attempt will be here made to answer Judge Friendly's contention that the maintenance and cure claim and Jones Act claim are so "totally different" as to negate joint jury trial.

In fact, Judge Friendly himself seems to negate the contention of "difference," insofar as they relate to joint jury trial, when he notes in his opinion below that were it not for his belief that "rigidly drawn" F. R. C. P. 38 and 39 prevent it, he would think it "desirable" for a judge, in the circumstances here involved, to be able to send the related maritime claims to the same jury which is deciding the Jones Act claim (306 F. 2d at 470, R. 74).

In support of his contention that "the relationship of a claim for maintenance and cure to one for personal injury under the Jones Act is wholly different from the allegation of unseaworthiness in addition to negligence as a basis for the personal injury claim" (306 F. 2d at 472, R. 77), Judge Friendly cites this Court's decision in *Pacific S.S. Co.* v. *Peterson*, 278 U. S. 130 (1928), which held that receipt of maintenance and cure did not bar a subsequent action under the Jones Act whereas a verdict on a claim of unseaworthiness would bar a subsequent Jones Act suit (*Baltimore S.S. Co.* v. *Phillips*, 274 U. S. 316; 1927).

Why this decision should be read as constituting a barrier to jury trial of a maintenance and cure claim as yet unpaid, which claim is appended to a Jones Act claim for damages arising out of the same incident, is baffling. *Pacific S.S. Co.* v. *Peterson*, *supra*, dealt only with the pleadings, and did not in any way indicate approval of overlapping recoveries, and contains nothing to suggest that if a seaman did obtain maintenance and cure benefits and thus collected his medical expenses, board and lodging costs during disability and medical care and wages to the end of the voyage, he might again obtain the same items of damage in the subsequent negligence or unseaworthiness action.

The opinion below also suggests (306 F. 2d at 472, R. 77, 78) that *res judicata* considerations justify submission of an unseaworthiness claim to the jury along with the appended Jones Act claim, but do not similarly support such submission of a maintenance and cure claim.

Yet, as has been clearly established herein (see Point II, *supra*), collateral estoppel problems will also arise with regard to disposition of a maintenance and cure claim by a different trier of facts following adjudication of a Jones Act claim based on the same injury and incident.

Thus, even the policy reasons set forth by Jud Friendly in support of trying the unseaworthiness claim

to the same jury which tries the Jones Act claim must be recognized as substantially applicable to the desirability of similar submission of the appended maintenance and cure claim.

POINT IV

The seaman's right to a jury trial should not depend on the fortuitous circumstance of diversity.

The opinion of the court below, on behalf of four of the nine members, held that a non-diversity plaintiff was not entitled to a jury trial on his appended maintenance and cure claim, notwithstanding that a diversity plaintiff would be so entitled under the "saving to suitors" clause (306 F. 2d at 465-468, R. 66-71). Judge Friendly stated that while a "jury trial is needed to give the diversity plaintiff the same right in the Federal that he would have had in the state court, there is no similar basis for Federal solicitude with respect to the non-diversity plaintiff" (306 F. 2d at 474-475, R. 82).

This position makes the choice of forum determinative of basic rights and basic differences in the mode of trial, a result which is traditionally avoided wherever possible and should not be countenanced unless it is unavoidable.

To economize time and expense, a plaintiff often will want to proceed in a federal court on his Jones Act and unseaworthiness claims, and join therewith his appended maintenance and cure claim. According to Judge Friendly and the opinion of the court below, a non-diversity plaintiff who, like the petitioner here, has three claims arising from a single set of facts, must split his claims and try some aspects of them twice, in different courts, if he would preserve his rights to jury trial.

Thus, if a non-diversity plaintiff-seaman is to obtain a jury trial on his maintenance and cure claim, he must bring

that claim in state court. It is historical and practically automatic that Jones Act claims are filed by seamen in federal court. See *Romero* v. *Int'l. Term. Oper. Co.*, 358 U. S. 354, 372 fn. 31, 409-410 (1959).

Surely, this result of inducing seamen to split their causes of action arising out of the same employment, accident and illness, and bring the Jones Act negligence claim in the federal court, and the maintenance and cure claim in the state court is ill-recommended in terms of fairness and effective judicial administration.

This Court "with an eye to the practicalities of admiralty personal injury litigation" has recognized that "full utilization of (the seaman's) remedies for personal injury" may and should be "accomplished only in a single proceeding". *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221, 224, 225 (1958):

> "It is but a step from that holding (in *McAllister*) to a holding that a claim for unseaworthiness may also be submitted to (the same) jury (which decides the Jones Act claim) * * * (and to a holding of) the propriety of also submitting the maintenance and cure count to the same jury in the interest of convenience and efficiency as well as of securing to the seaman the full utilization of his remedies in a single proceeding."
>
> Currie, *op. cit.*, 27 U. Chi. L. Rev. at 64.

A plaintiff-seaman is entitled to know, at the time he selects his forum, whether the basic right of jury trial will be accorded to him in that forum.

If he is a diversity plaintiff he unquestionably has a jury trial in the federal court on all of his claims.

If he is a non-diversity plaintiff, he is entitled to know, in advance, that provided that his Jones Act claim is bona fide (which does not mean that he must necessarily succeed before the jury on it) a maintenance and cure claim ap-

pended to that Jones Act claim and arising out of the same employment and incident will be tried in the Federal court by the same jury which decides the Jones Act claim.

If such a plaintiff's right to a jury trial is subject to the mere exercise of the discretion of the trial judge, which is to all effects and purposes not reversible nor necessarily predictable, or may be eliminated because the Jones Act claim though bona fide is unsuccessful, then he enters the federal court with his maintenance and cure claim at his peril and with the basic right of jury trial exposed to the fortuitous developments of the litigation.

In such circumstances, a well-advised non-diversity seaman-plaintiff, seeking a jury trial on his maintenance and cure claim, must turn to the security of the state court, where his jury rights are fixed and ineradicable.

An affirmative decision by this Court on the question now before it will, however, provide certainty to all seamen that the basic right of jury trial on their maintenance and cure claims is fixed and ineradicable from the time they enter federal court, provided merely that they properly demand a jury trial and that the maintenance and cure claim is properly appended to a bona fide Jones Act claim arising out of the same facts and incident.

This certainty and simplicity is long overdue in this area of the law dealing with simple workingmen's efforts to obtain compensation for industrial injury, and will constitute an authoritative approval of the return to the eminently satisfactory procedure of so submitting appended maintenance and cure claims to the jury which was followed for many years in the courts of the Federal system.

The record here demonstrates that diversity in fact, although not pleaded, did exist in this case. The petitioner's intestate, the plaintiff, at the time of filing having been a New York resident born in Spain and thus a citizen

of Spain or New York, and the respondent having set forth in its answer that it was a foreign, *i.e.*, non-New York, corporation (R. 2, 5, 9, 39, 70-71).

The instant action was filed on June 23, 1955, and thus the amendment of 28 U. S. C. Section 1332(c) on July 25, 1958 (72 Stat. 415) negating diversity of citizenship if the corporate defendant herein had its principal place of business in New York, by its own terms does not apply. See *Lorraine Motors, Inc.* v. *Aetna Casualty & Surety Co.*, 166 F. Supp. 319, 320 (E. D. N. Y. 1958).

The court below unanimously agreed that where diversity of citizenship exists a seaman's right to a jury trial on a maintenance and cure count is absolute, but disagreed as to whether on the record either the trial court or the Court of Appeals should have recognized the existence of diversity jurisdiction and granted a jury trial on that ground. (Compare 306 F. 2d at 465-468, R. 66-71, with 306 F. 2d at 477 fn. 2, R. 86-87 fn. 2.)

Although certiorari was not granted by this Court as to this issue, it is here called to the Court's attention in the event the Court believes that issue incidental to the matter being reviewed or included within the general terms of the question upon which certiorari was granted (R. 92), and therefore properly to be considered herein. See, *e.g.*, *Boynton* v. *Virginia*, 364 U. S. 454, 457 (1960); *Rorick* v. *Devon Syndicate*, 307 U. S. 299, 303 (1938); see also, *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221, 226 (1958); *Beacon Theatres, Inc.*, v. *Westover*, 359 U. S. 500, 501 (1959).

It is respectfully submitted that the courts below were required to exercise the diversity jurisdiction if it in fact existed, inasmuch as jurisdictional facts are always before the court and are required to be recognized by it *sua sponte*. It is unquestionable that a federal court will not dismiss for want of jurisdiction if diversity does appear on the record, even if not pleaded; jurisdiction is one aspect of modern litigation which always yields to fact.

As stated by Judge Clark, dissenting below (306 F. 2d at 477, R. 86), the refusal in the instant case to recognize the facts of diversity jurisdiction and the jury trial privilege which arose therefrom was:

> "cavalier treatment of perhaps the most cherished of all procedural rights and is not justified on the record before us."

The contention of the court below that the jurisdictional allegations in the pleadings herein refer solely to the Jones Act (306 F. 2d at 463, 468; R. 61-62, 69-71), and that failure specifically to refer to the fact of diversity as a jurisdictional basis waived the plaintiff's rights to a trial by jury on the maintenance and cure count (306 F. 2d at 468, R. 69-71), is sufficiently answered by this Court's recent statement in *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469 (1962) that:

> "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings."

Diversity jurisdiction having in fact existed, the courts below were in error in denying petitioner the basic right of jury trial on the maintenance and cure claim.

Conclusion

The result reached by the court below was based on an admitted "rigid" interpretation of Federal Rules of Civil Procedure 38 and 39, a narrow interpretation of the factual intertwining of maintenance and cure claims with Jones Act claims, as compared to the intertwining relationship of unseaworthiness and Jones Act claims, and a doctrinaire and formalistic attitude to the actual presence of diversity jurisdiction and the effect of the fortuitous lack thereof. As was aptly stated by Professor Moore in discussing the very question here involved and criticising the type of result reached by the court below (5 Moore's *Federal Practice*, 285; 2d Ed.):

> "[T]he history of procedure teaches that a technical and unrealistic approach to a problem is a prolific source of trouble."

The discussion hereinabove reveals that the result favored by respondent herein and granted by the court below has already been "a prolific source of trouble" to the District Court judges charged with making maintenance and cure awards after trial to a jury of the related Jones Act claim. An establishment of this result as the maritime law of the land by way of approval by this Court would perpetuate the "source" and cause a continued increase of the "trouble".

Furthermore, and aside from all considerations of simplified trial procedure, favorable as they may be to the instant petitioner, the Court here deals with a critical, basic and cherished right and privilege—the availability of a jury trial.

It is not without significance that this Court has most recently stated (*Simler* v. *Conner*, — U. S. —, 31 L. W. 4223; decided February 18, 1963):

> "The federal policy favoring jury trials is of historic and continuing strength."

This Court has assiduously demonstrated, throughout the years, that a seaman's right to jury resolution of the disputed issues relating to his claims for damages due to industrial injury is an important part of this historic and continuing policy, *Michalic* v. *Cleveland Tanker, Inc.*, 364 U. S. 325, (1960); *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107 (1959); *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521 (1957); *Jacob* v. *City of New York*, 315 U. S. 752 (1942).

This policy may and should be maintained by an affirmative answer to the question now before this Court.

By reason of the foregoing, a seaman who joins a claim for unpaid maintenance and cure with a claim for Jones Act negligence is entitled to a jury trial on the maintenance and cure claim issues, and the question upon which this Court has granted certiorari may and should be answered in the affirmative.

Respectfully submitted,

THEODORE H. FRIEDMAN
Counsel for Petitioner
1501 Broadway
New York, N. Y.

JACOB RASSNER
Attorney for Petitioner
15 Park Row
New York, N. Y.

THEODORE H. FRIEDMAN
JACOB RASSNER
BENJAMIN GLICKMAN
EVE M. PREMINGER
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1962.

DOCKET No. 463.

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of Andres San Martin, deceased,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

BRIEF OF RESPONDENT, UNITED STATES LINES COMPANY.

MATTHEW L. DANAHAR,
Attorney for Respondent,
120 Broadway,
New York 5, N. Y.

CHARLES N. FIDDLER,
JOSEPH R. KELLEY, JR.,
Counsel.

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BRIEF OF RESPONDENT, UNITED STATES LINES COMPANY

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1962.

It is not disputed that the jurisdiction of this Court is invoked by virtue of 28 U. S. C. Section 1254 (1) and 2101 (c). However, respondent contends that the granting of the writ, even in its limited scope, was improvident and upon reconsideration should be dismissed. (See Point I of this brief)

STATEMENT

Petitioner's intestate, Andres San Martin, a seaman who died during the pendency of the appeal to the Court of Appeals, sued United States Lines Company, his employer, for injuries allegedly sustained aboard its vessel, the SS. *American Reporter*.

The complaint contained two causes of action. The first cause of action set forth two separate counts under which recovery was sought; (1) Negligence under the Jones Act, 46 U. S. C. 688; (2) Unseaworthiness under the General Maritime Law. The second cause of action was to recover sums allegedly due for maintenance and cure, earned wages and wages to the end of the voyage. (R 2, 3, 4)

There was no allegation of diversity of citizenship set forth in the complaint and petitioner's attorney at no time in the District Court, either before, during or after the trial, ever asserted jurisdiction based upon diversity.

At the outset of the trial and before a jury was selected, the Court, over the objection of San Martin's attorney which was based solely on "pendency," ruled that the second cause of action would be decided by it at the end of the presentation of all the evidence. (R 8, 9)

The action was tried before the Honorable Richard H. Levet and a jury and resulted in a jury verdict for the respondent on both counts of the first cause of action and an award by the Court, sitting without a jury, of $224.00, plus interest, on the second cause of action. Judgment was entered on the 6th day of September, 1960.

The Facts

San Martin, age 62 at the time of trial, joined the SS. *American Reporter* in November, 1953 as a wiper. On November 5, 1954, when the vessel was tied up at the Brooklyn Army Terminal in New York, San Martin claimed that he was injured, while he and two other wipers were engaged in loading engine room stores aboard the vessel from the dock. The stores, in addition to other items, included four 100 pound metal drums of boiler cement and one 200 pound drum.

San Martin testified that while carying a 100 pound drum up the gangway, the drum and gangway moved and he sustained certain injuries which disabled him and necessitated medical treatment. It was for the period that he was disabled and not hospitalized that San Martin sought to recover maintenance and cure.

The Question Presented for Decision

Does a seaman have a right to a jury trial on a claim for unpaid maintenance and cure when joined with a claim for Jones Act negligence?

Petitioner under Point I of his brief says that the question presented "calls upon the Court now to decide the issue left open in the Romero case" 358 U. S. 354. This is not so, which is clear from the language of the majority opinion written by Mr. Justice Frankfurter that appears at page 381 of the opinion and reads as follows:

> "Here we merely decide that a district judge has jurisdiction to determine whether a cause of action has been stated if that jurisdiction has been invoked by a complaint at law rather than by a libel in admiralty, as long as the complaint also properly alleges a claim under the Jones Act. We are not called upon to decide whether the District Court *may* submit to the jury the 'pendent' claims under the general maritime law in the event that a cause of action be found to exist." (Emphasis supplied.)

The question presented by the granting of the writ in the case at bar is not whether a maintenance and cure claim, which is joined with a Jones Act claim *may* be tried to a jury but whether there is a *right* to such a trial under these circumstances.

The Contentions of the Parties

In the first instance, it is the position of the respondent that the writ was improvidently granted, because the Jones Act cause of action, to which it is claimed the maritime cause of action was "pendent", has been extinguished and if this Court reverses the lower court and orders a jury trial of the maritime claim, there will be the anomalous situation of a maritime claim being tried on the civil side of the Federal Court before a jury without being pendent to anything.

In regard to the merits of this appeal, it is the petitioner's contention that even in the absence of diversity, the courts of the United States have the power to, and should, on the basis of judicial policy, *create the right* to a jury trial of a maritime claim for maintenance and cure, if the claimant elects to join this purely maritime claim with a Jones Act claim on the civil side of the Federal Court. In support of this position he invokes the "pendent jurisdiction" doctrine of *Hurn* v. *Oursler*, 289 U. S. 238 (1933) and various "policy considerations."

On the other hand it is the respondent's position that the right to maintenance and cure is strictly a maritime right and that a claim based on such right is purely maritime in nature and continues to be so even though joined in the same complaint, on the civil side of the Court, with a statutory claim such as the Jones Act. Thus, in the absence of diversity, a suit for the enforcement of a maritime right in the Federal Court can only be determined under the court's admiralty jurisdiction, where there can be no jury, "pendency" or "policy considerations" notwithstanding.

The Federal Rules of Civil Procedure apply only to the civil jurisdiction of the Federal Court and have no

application to its admiralty jurisdiction, which is regulated by the Admiralty Rules. While conceding that the Federal Rules of Civil Procedure do not prohibit the joinder, in the one complaint, of a maritime claim with a non-maritime claim on the civil side of the court, respondent contends that such joinder does not create rights, such as the right to a jury trial of a maritime claim which has never been recognized.

The respondent will show that the right to a jury trial of a maritime claim can only be derived from the Constitution or Congressional grant. The Constitution gives no such right and Congress has not exercised its power to create such a right, except in certain suits not applicable to the case at bar. Accordingly such a right cannot now be created for the petitioner by this Court, merely because he elected to join his purely maritime claim with his Jones Act claim and regardless of policy considerations.

POINT I

THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

The writ of certiorari granted in this matter was limited to the question:

> "1. Does a seaman have a right to a jury trial on a claim for unpaid maintenance and cure when joined with a claim for Jones Act negligence?"

However, the "claim for Jones Act negligence" no longer exists. It was disposed of and extinguished by the jury verdict which was affirmed by the Court below, an affirmance which this Court declined to review, 371 U. S. 932.

Thus the remaining "claim for unpaid maintenance and cure" stands alone.

The concrete fact which conclusively shows the independence of the maintenance and cure claim from the "claim for Jones Act negligence" is the judgment of the trial court (affirmed by the Court of Appeals, as not clearly erroneous) granting a recovery on the maintenance and cure claim in the sum of $224.00 plus interest, despite the other concrete fact that the petitioner's claim under the Jones Act has been extinguished by the jury verdict. Surely, if the claim for maintenance and cure were dependent on the Jones Act claim, a recovery on the maintenance and cure claim would be inconsistent. The result is, of course, in accord with the fundamental legal principle stated in *Pacific Steamship Company* v. *Peterson*, 278 U. S. 130, 138 that the right of maintenance and cure, "is independent of the right to indemnity or compensatory damages for an injury caused by negligence; and these two rights are consistent and cumulative."

Consequently, there is no room left in this case to decide the now abstract issue of whether a claim under the Jones Act, joined with a claim for maintenance and cure should as of right be considered at one trial before a jury.

The dissenting opinion of Judge Clark in the Court below, which may have moved this Court to grant the petition for the writ, does not assert that the Jones Act (which by its terms gives a "right of trial by jury") is a Congressional grant of a statutory right to a trial by jury of a maintenance and cure claim when joined with a Jones Act claim. Indeed, the opinion abjures reliance on "pendent" jurisdiction, which does not govern the mode of trial but rather the question of access to the Federal Court. Instead, arguments of expedience are advanced, in which a maintenance and cure claim is referred to as a "single claim or cause" when joined with a Jones Act claim (which

it surely is not), supported by such phrases as "practical convenience and necessity"—"there should be only one cause of action for jurisdiction and hence for trial. When a seaman has been injured his total claim should not be butchered up. He should be able to put it forward either wholly in admiralty without any right of jury trial, or wholly at law with a right of jury trial on all the issues"; all to buttress the conclusion that "we are constrained to conclude that we must go where reason and practical necessity take us, namely to the unitary form of approach and the resulting trial by jury as we have outlined."

If this Court has granted certiorari on the basis of "practical convenience and necessity" and the "unitary form of approach", such a grant is surely improvident, for the concept of a "unitary form of approach" or "total claim" can never be applied to a solitary claim. "Practical convenience and necessity" cannot sustain a retrial of plaintiff's only surviving claim even if it would have been practical and convenient to have a "unitary" trial of all the claims, when they first were presented to the trial court.

As stated in *The Monrosa et al.* v. *Carbon Black Export, Inc.*, 359 U. S. 180, 184:

> "Examination of a case on the merits, on oral argument, may bring into 'proper focus' a consideration which, though present in the record at the time of granting the writ, only later indicates that the grant was improvident. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, *supra*, at 73.
>
> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of

> the extent to which these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly."

This Court has repeatedly held that it "is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard." *California* v. *San Pablo and Tulare R. R. Co.*, 149 U. S. 308, 314. Unless there is an actual "controversy" to be decided it would be improper to render a decision for the purpose of advising the courts how to proceed in future cases as a matter of judicial administration.

POINT II

THE RIGHT TO A JURY TRIAL IN A MARITIME CASE CAN ONLY BE DERIVED FROM THE CONSTITUTION OR CONGRESSIONAL GRANT. THE CONSTITUTION DOES NOT PROVIDE FOR SUCH A RIGHT NOR HAS CONGRESS GRANTED IT EXCEPT IN CERTAIN CASES NOT HERE APPLICABLE.

The doctrine of maintenance and cure is of ancient origin and can be traced back to the sea codes of the Middle Ages. It was adopted in England during the reign of Richard I (1189-1199) and was carried over into the Vice Admiralty courts of Colonial times. These courts had jurisdiction over admiralty matters, including claims for maintenance and cure, in America, prior to the adoption of the Constitution. In the trial of these matters there was no jury. *Hendry* v. *Moore*, 318 U. S. 133.

Thus at the time of the adoption of the Constitution there existed in America an admiralty and maritime jurisdiction, in which maritime claims including maintenance and cure were heard and determined without benefit of a jury. The framers of the Constitution had this jurisdiction in mind as it then existed and in setting forth the judicial power of the United States provided for the continuance of this jurisdiction in Article III, Section 2, Clause 1, which read "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." This provision adopted the principles of maritime law that existed prior to the Constitution as well as the procedure for applying this law and incorporated both into the maritime law and practice of the United States.

The purpose of the framers was to place the then existing admiralty system including its substantive and procedural features under national control "because of its intimate relation to navigation and to interstate and foreign commerce." *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375 (1924).

As Mr. Justice Van Devanter said in the *Panama Railroad Co.* case at p. 385:

> "Such a law or system of law existed in Colonial times and during the Confederation and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control because of its intimate relation

> to navigation and to interstate and foreign commerce."

It is clear, therefore, that the Constitution did not grant a right to a jury trial in admiralty and maritime cases but instead adopted a system that had proved workable for centuries, in which there was no jury trial.

Article III of the Constitution, in addition, granted to Congress the power to create such inferior federal courts as it deemed necessary and proper. Congress in the First Judiciary Act of 1789 exercised this power and created inferior courts and invested them with admiralty and maritime jurisdiction. It is well settled that these courts were not common law courts or courts of general jurisdiction "... but are strictly limited to the Jurisdiction conferred upon them by Congress." *Jordine* v. *Walling*, 185 F. 2d 662, 667.

The language of the Act does not show any intent by Congress to confer a right of jury trial in admiralty and maritime cases but merely an intent to preserve such common law remedies as were available to suitors in the common law courts of the Colonies or States prior to the adoption of the Constitution. Thus, the inferior courts in exercising the admiralty and maritime jurisdiction conferred upon them could only do so according to the procedure in admiralty in which trial by jury was not allowed. *Jordine* v. *Walling*, *supra*.

Mr. Justice Frankfurter in *Romero* v. *International Terminal Operating Co., Inc.*, 358 U. S. 354 points this out at page 362.

> "Section 9 not only established federal courts for the administration of maritime law; it recognized that some remedies in matters maritime had been traditionally administered by common-law courts of the original States. This role of the States in the

> administration of maritime law was preserved in the famous 'saving clause' . . . Since the original Judiciary Act also endowed the federal courts with diversity jurisdiction, common-law remedies for maritime causes could be enforced by the then Circuit Courts when the proper diversity of parties afforded access . . . The District Courts, endowed with 'exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction', sat to enforce the comprehensive federal interest in the law of the sea which had been a major reason for their creation. This jurisdiction was exercised according to the historic procedure in admiralty, by a judge without a jury.'"*

Thus it is clear that from their very inception, the inferior courts of the United States had jurisdiction over claims for maintenance and cure but only in admiralty where there was no right to a trial by jury.

The Judiciary Act of 1789 did not authorize the inferior courts to give a jury trial when Congress had not provided for it. As was said in *Cara* v. *Curtis*, (1845) 3 How. 236, 11 L. Ed. 576, the inferior courts were not only dependent upon Congress for their very existence and jurisdiction but for the exercise of that jurisdiction including the modes of trial. See also *Lockerty* v. *Phillips*, (1943) 319 U. S. 182.

Congress to the present day, with the exception of the Jones Act 46 U. S. C. Section 688 and the Great Lakes Act 28 U. S. C. Section 1873, has not enlarged the jurisdiction of the Federal Courts to the extent that there is a right to a jury trial on a purely maritime claim in the absence of diversity.

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* The *Romero* case was followed by a unanimous Court in *Aho* v. *Jacobsen*, 359 U. S. 25 (1959), when the Court remanded the case "for retrial on the admiralty side."

POINT III

THE PENDENCY DOCTRINE OF *Hurn* v. *Oursler*, 289 U. S. 238 (1933) RELATES TO THE JURISDICTION OF THE FEDERAL COURT TO DECIDE A CLAIM AND NOT TO THE MODE OF TRIAL. ACCORDINGLY THIS DOCTRINE IS NOT APPLICABLE TO THE QUESTION PRESENTED.

Judge Friendly in the opinion below noted that this Court in *Romero* v. *International Terminal Operating Co., Inc.*, 358 U. S. 354 recognized the anomaly of applying the *Hurn* doctrine in a case where the court already had jurisdiction over the claim asserted to be pendent. He said at P. 473:

> "The Supreme Court pointed out in Romero, 358 U. S. 380-381, 79 S. Ct. 468, 3 L. Ed. 2d 368, the anomaly of applying the 'pendent jurisdiction' doctrine of *Hurn* v. *Oursler*, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933)—that the assertion of a Federal claim permits a Federal court to decide a sufficiently related non-Federal claim otherwise outside its jurisdiction—to a claim for maintenance and cure which is always within Federal jurisdiction under 28 U. S. C., Section 1333 (1), as, indeed, both Judge Medina and Judge Lumbard had done a few weeks earlier in Bartholomew, 263 Fed. 2nd 449, 455."

In conclusion Judge Friendly said that the *Hurn* doctrine of pendency, as developed by this Court is related to the jurisdiction of a Federal Court "to decide a claim—not to the mode of trial; . . .". This conclusion was justified because there is nothing in the *Hurn* opinion suggesting that once pendency is established, the pendent claim ac-

quires, as a matter of right, the mode of trial of the principal claim.

As Judge Friendly said, P. 473:

> ". . . no one has ever supposed that joinder of a 'state' equitable claim with a related 'federal' legal claim under Hurn *v.* Oursler entitled the former to a jury trial. We see no reason for a different result when the joined claim is a Federal claim arising under the general maritime law."

Accordingly there appears to be no sound basis for extending the pendency doctrine and granting a jury trial on a maritime claim for maintenance and cure especially when, as has been pointed out above, the power to grant such a trial rests solely in the Constitution and Congress. Also such an extension could not be reconciled with the Federal Rules of Civil Procedure, promulgated by this Court under the authority granted to it by Congress, which expressly limits the class of cases afforded a jury trial as a matter of right and in which class maritime claims are not included.

POINT IV

THE FEDERAL RULES OF CIVIL PROCEDURE GOVERN A CLAIM FOR MAINTENANCE AND CURE THAT IS JOINED WITH A JONES ACT CLAIM BUT THESE RULES DO NOT GIVE A RIGHT TO A JURY TRIAL OF THE MAINTENANCE AND CURE CLAIM AND IN FACT EXPRESSLY PROHIBIT IT.

The Jones Act 46 U. S. C. Section 688, by explicit provision permits a seaman to sue in an action at law for damages with the right of trial by jury. As such it is

governed by the Federal Rules of Civil Procedure, even though an action brought pursuant to it, by a seaman, is basically a maritime claim.

Rule 18(a) of the Federal Rules of Civil Procedure, provides for the joinder of "claims either legal or equitable or both". A claim for maintenance and cure although not strictly "legal or equitable in nature" is embraced within this Rule and therefore can be properly joined in the same complaint with a Jones Act cause of action. As Judge Friendly said, the above quoted words were used in the Rule not for the purpose of preventing the joinder of claims under the maritime law, which had already been permitted in the courts but rather "to prevent future judicial adherence to traditional distinctions against the joinder of legal and equitable claims" (P. 469).

In the event there is a joinder of claims in one complaint, in which the right to a jury trial exists in one but not the other, then as pointed out by Judge Friendly "each is to be given the mode of trial appropriate to its nature, *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469 (1962); *Ring* v. *Spina*, 166 F. 2d 546, 550 (2 Cir.), Cert. denied, 335 U. S. 813 (1948); *Orenstein* v. *United States*, 191 F. 2d 184 (1 Cir. 1951); *Tanimura* v. *United States*, 195 F. 2d 329 (9 Cir. 1952); *Leimer* v. *Woods*, 196 F. 2d 828 (8 Cir., 1952); *Schaefer* v. *Gunzburg*, 246 F. 2d 11, (9 Cir.), Cert. denied, 355 U. S. 831, (1957); *Chappell & Co.* v. *Palermo Cafe Co.*, 249 F. 2d 77 (1 Cir. 1957), . . .".

The Federal Rules of Civil Procedure in Rules 38 and 39 "clearly and comprehensively" provide for the mode of trial in all actions in which they are applicable. The Rules do not provide for jury trials in actions, where such a right did not exist prior to their adoption. They merely assure the preservation of the right to a jury trial in all

cases, where such a right previously existed, namely under the Seventh Amendment of the Constitution and statutes of the United States.

Rule 39 specifically states that unless a right of trial by jury of some or all of the issues tendered exists under the Constitution or statutes of the United States then there shall be no jury trial with respect to them. It reads as follows:

> Rule 39
>
> (a) "When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless . . . (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

Accordingly, if the court granted a jury trial of a claim not triable as of right under the Constitution or statute of the United States, it would be doing so in direct violation of the Rules.

The petitioner, obviously, cannot claim a right to a jury trial on his claim for maintenance and cure under the Seventh Amendment to the Constitution because that amendment is limited to "suits at common law" involving legal rights. A maintenance and cure suit deals with rights and remedies maritime rather than legal in nature. As was said by this Court over a century ago the Amendment is "limited to rights and remedies peculiarly legal in their nature," *Shields* v. *Thomas*, 59 U. S. 253, 262 (1856).

Thus the only possible right to a jury trial on petitioner's claim for maintenance and cure would be under

a statute of the United States, which in the case at bar could only be the Jones Act.

It is clear from the Jones Act itself, that there is no explicit language providing that the claim of a seaman for maintenance and cure is to be considered as part of the Act. The Jones Act expressly and solely deals with the right of a seaman to recover damages for personal injuries based upon negligence. Neither does the language of the Act nor the background, which prompted its enactment, indicate any intent or purpose by Congress to include implicitly a claim for maintenance and cure as part of the Act.

Prior to the enactment of the Jones Act in 1920, a seaman could not recover damages for personal injuries resulting from the negligence of his fellow servants. It was to remedy this situation that Congress enacted the Jones Act. Congress was not concerned with incorporating under its provisions, the then existing rights that a seaman had under the doctrines of unseaworthiness and maintenance and cure. If Congress was at all interested in such an objective, it would have taken very little to accomplish this in the wording of the Act. The fact that nothing was mentioned in the Act regarding these already existing rights of seamen, strongly supports the view that Congress intentionally omitted them from the Act and left the seamen with these rights, and the remedies to enforce them, as they then existed. To now hold that Congress must have intended that a maintenance and cure claim should become part and parcel of a Jones Act claim, so that the right to a jury trial exists with respect to the former, would be nothing more than judicial legislation and in complete disregard of the obvious intentions of Congress.

Aside from the above there is little, if any, merit to the claim of the petitioner that his maintenance and cure claim

is so intertwined with the Jones Act claim that he should be given a right to a jury trial in regard to the former. The only possible intertwining of petitioner's Jones Act claim and his maintenance and cure claim is the fact that they both arose out of the same incident. From that point on, the intertwining ceases, not only because of the diverse nature of each claim, but because of what each seeks to achieve.

The Jones Act claim is legal in nature and sounds in tort, whereas the maintenance and cure claim "has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident", *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 371 (1932). Each claim is wholly independent and distinct from the other. In the one, damages are sought and usually in an amount far exceeding that recoverable in the other. An adjudication with respect to one claim is not necessarily res judicata with respect to the other. The element of proof necessary to establish a Jones Act claim is more extensive and burdensome than that to support a maintenance and cure claim. In connection with the latter all that it is necessary to show is that an injury was sustained in the service of the ship and the extent of the period of disability. As to the former, in addition to proving an injury in the service of the ship, a seaman must satisfactorily establish all the necessary elements of negligence including notice. Also the limitations on the time to sue in each is different.

Thus the separate, distinct and independent nature of the two causes of action cannot be disputed and there is no reasonable basis for considering a maintenance and cure claim, as part of the Jones Act claim, either as being intended as such by Congress or by intertwining efforts, so as to create the *right* to a jury trial in such a claim.

CONCLUSION

Petitioner's claim for maintenance and cure, which was joined with his Jones Act claim, is no longer pendent to it, the latter having been extinguished. Therefore, a reversal now and the direction of a new trial by this Court would not answer the question presented, because a new trial would involve the maintenance and cure claim alone and would be before a different jury than the one that decided the Jones Act claim. This would result in the anomalous situation of a maritime claim being determined by a jury on the civil side of the Federal Court. Under these circumstances the writ was improvidently granted.

A right to maintenance and cure is strictly a maritime right and in the absence of diversity of citizenship is only cognizable under the admiralty jurisdiction of the Federal Court, although it may be joined in the same complaint with a civil action.

The right to a jury trial in the Federal Court can only be derived from the Constitution or from statutes of the United States. There is no Constitutional right to a jury trial in a maintenance and cure cause of action and Congress up to the present has never seen fit to enact legislation creating such a right.

In the absence of Congressional grant there can be no right to a jury trial of a claim for maintenance and cure pendency and policy considerations notwithstanding.

A maintenance and cure cause of action is separate and independent from a Jones Act cause of action and cannot be considered either expressly or impliedly a part of the Jones Act so as to give a right to a jury trial. Neither is a main-

tenance and cure claim so intertwined with a Jones Act claim that it can be carried along with it into the jury room.

The question presented should be answered in the negative.

Respectfully submitted,

MATTHEW L. DANAHAR,
Attorney for Respondent.

CHARLES N. FIDDLER,
JOSEPH R. KELLEY, JR.,
Counsel.

Supreme Court of the United States

October Term, 1962

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Docket No. 463

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MARTIN, Deceased,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER, THOMAS I. FITZGERALD, PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF ANDRES SAN MARTIN, DECEASED

THEODORE H. FRIEDMAN
Counsel for Petitioner
1501 Broadway
New York, N. Y.

JACOB RASSNER
Attorney for Petitioner
15 Park Row
New York, N. Y.

THEODORE H. FRIEDMAN
JACOB RASSNER
BENJAMIN GLICKMAN
EVE M. PREMINGER
of Counsel.

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In Response to Point I of Respondent's Brief

Respondent here seeks dismissal of the writ of ceritiorari as improvidently granted.

This Court rejected this argument, when, on December 10, 1962, it granted the writ of certiorari herein on the specific question which respondent now seeks to vacate in Point I of its present brief. The respondent does not set forth any new facts, developments or analysis that were not presented in its initial brief in opposition to the petition seeking the writ. Nor is there anything in this case and its short and simple record that respondent has pointed to that has only now been brought into proper focus that could warrant dismissal of the writ.

To the contrary, respondent's argument seeking dismissal of the writ underlines the seriousness of the error of the court below when it denied petitioner a jury trial on the maintenance and cure issues herein.

The trial court in effect ordered a separate and subsequent trial on the issues of maintenance and cure when it specifically directed that (R. 8):

> "* * * if there is any additional testimony necessary (with regard to the maintenance and cure issues) I will hear that *after* the jury has rendered its verdict." (Emphasis added.)

In thus causing the testimony relating to maintenance and cure not to be brought before the jury, the trial court affected the validity of the jury determination on the intertwined issues left to it. If it was error, as is respectfully alleged by petitioner here, to deprive petitioner of a jury trial on the maintenance and cure issues, the entire result below was affected by this error and the case should be reversed and remanded for a new trial on all issues.

The claim of the petitioner alleged aggravation of his injury as part of his Jones Act claim. The complaint sought not only to recover the outstanding and unpaid maintenance and cure (R. 4; Second Cause of Action, ¶¶ 15-17 of Complaint), but also damages for "failing to provide plaintiff with timely, adequate (and) proper * * * maintenance and cure, thereby aggravating his condition" (R. 3-4; First Cause of Action, ¶ 13 of Complaint).[1]

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[1] In *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 376 (1932), this Court stated:

> "The failure to furnish cure is a personal injury actionable (under the Jones Act) at the suit of the seaman during life, and at the suit of his personal representative now that he is dead."

In *Sims* v. *United States of America War Shipping Adm'n*, 186 F. 2d 972, 973 (3rd Cir. 1951), *cert. denied* 342 U. S. 816, (1951), it was held that under the Jones Act the shipowner "* * * is liable for the consequential damages occasioned by the failure to provide for maintenance and cure after termination of the voyage when it was demanded."

This Court has only recently reaffirmed the clear obligation of a shipowner to pay maintenance and cure to an injured seaman when it is due, and held that failure to pay maintenance and cure when it is due will expose the shipowner to liability for all consequential damages. *Vaughan* v. *Atkinson*, 369 U. S. 527 (1962).

The latter claim did not involve mere empty pleading. The medical testimony on behalf of the petitioner submitted to the trial court alone at its subsequent hearings was to the effect that "conservative treatment" (R. 50):

> "• • • would partially restore the plaintiff to a condition in which he might work at non-arduous tasks such as an elevator operator, an assembler of parts or a job conducted in a sedentary manner."

Had the trier of fact found in petitioner's favor on this precise issue, petitioner would have been entitled to receive as a day maintenance for the extensive period involved and the amount of the cost of the medical care. In addition thereto petitioner would have been entitled to recover, pursuant to paragraph 13 of the first cause of action of his complaint, for the pain and suffering unnecessarily endured, the earnings lost, and the consequential damages arising out of the delay in providing him with maintenance and cure and the delay consequent thereto in enabling him to be fit to perform the "non-arduous tasks" of gainful employment described by petitioner's physician.[2]

The issues of whether there was unpaid maintenance and cure outstanding and the amounts and periods of time involved were vigorously disputed by the parties. Considerable evidence on these matters was presented to the trial court (R. 1, 47, 50-53).

However, unless and until it was determined whether respondent did in fact owe petitioner's intestate some sum of money for unpaid maintenance and cure, and unless and

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[2] This recovery could well have been substantial, for the delay in providing petitioner's intestate with maintenance and cure was extensive. Petitioner's initial demand for the outstanding maintenance and cure must be deemed to have been made no later than the time of the filing of his complaint, i.e., June 23, 1955 (R. 1). *Brown* v. *Draco Corp.*, 258 F. 2d 704 (3d Cir. 1958), *cert. denied*, 359 U. S. 960 (1959) affirming 157 F. Supp. 265 (W. D. Pa. 1957). The trial herein was not completed until June, 1960, five years later.

below in four subsequent hearings after the jury verdict (see until the periods of time and the injuries involved in such debt for unpaid maintenance and cure were determined, the jury could not render a judgment as to whether and to what extent respondent had *aggravated* petitioner's intestate condition by failing to provide the required maintenance and cure at the time it was due. Thus the retention by the trial court of the issue of what maintenance and cure payments were due necessarily interfered with and prevented a jury determination of what damages to allow the petitioner for aggravation, "hurt" (*Cortes, supra,* 287 U. S. at 371) or "consequential damages" (*Sims, supra,* 186 F. 2d at 973) caused by virtue of the respondent's failure to pay maintenance and cure when due, as alleged by petitioner in paragraph 13 of the first cause of action of the complaint (R. 3-4).

Accordingly, it is respectfully submitted that recognition of the error of the court below in depriving petitioner of a jury trial on the maintenance and cure issues requires reversal and remand for a new trial not only with regard to the second cause of action, but with regard to the entire Jones Act claim set forth in the complaint.

In asserting that the writ of certiorari herein should be dismissed as improvidently granted, respondent has also failed to recognize or discuss the issue of *when* the right to a jury trial on a maintenance and cure claim joined with a Jones Act claim attaches. If a seaman may lose his right to a jury determination on a maintenance and cure claim, which *arguendo* he would otherwise have, merely because the jury at the conclusion of the trial has found in favor of the shipowner on the Jones Act and unseaworthiness claim, utter chaos rather than fixed procedure will rule the roost in an area which provides a large bulk of federal district court litigation. The seaman, and the other parties, including the court, should be able to know from the outset whether or not the issues in the litigation are to be tried to a jury. If the seaman's right to a jury, although he has coupled his

maintenance and cure claim with a Jones Act claim arising out of the same incident, may be suddenly stymied or disappear at the very end of the trial, then the uncertainty and confusion involved cannot help but be destructive of orderly administration of these seaman's claims in the federal courts.

Accordingly, petitioner submits that his rights to a jury trial on the maintenance and cure issues became fixed at the time the complaint was filed on June 28, 1955 with proper jury demand on all issues (R. 1-2). At the time the trial court reserved to itself the determination of the maintenance and cure issues, on May 12, 1960, at the very opening of the trial and before any testimony had been heard or verdict been taken (R. 1-8), petitioner had a right to a jury trial on those issues. As aforestated, the denial of his jury right interfered with and invaded the proper jury disposition of all of the aspects of his Jones Act claim. For respondent to urge that the error of depriving a party of his basic and cherished procedural right of jury trial should now go uncorrected because of the resultant verdict on the negligence and unseaworthy contentions is to heap insult on injury, and contradict all concepts of reason, logic and justice.

In Response to Point II

Respondent here asserts nothing more than that under Article III of the Constitution federal courts are invested with admiralty and maritime jurisdiction, and that on the admiralty side, the court sits without a jury. What respondent seems to be unable to recognize is that the issue before this Court is not whether the federal courts have admiralty and maritime jurisdiction—no one has disputed that. The issue is rather whether a maintenance and cure claim, recognized in the state courts as a common law action and there fully entitled to a jury trial may be made pendent to a Jones Act claim and, as such pendent proceeding be tried to the same jury as hears and determines the Jones Act claim.

Respondent seems to believe that federal admiralty jurisdiction of maintenance and cure claims is exclusive and unique. Yet maintenance and cure claims are also tried before juries as common law claims in the various state courts. They have been so tried since before the Constitution and so continue to the present date.[3]

Thus, petitioner had two discrete avenues by which he might enter the federal court for the purpose of trying his claim for unpaid maintenance and cure. He might have filed a suit for maintenance and cure, without any other, on the admiralty side of the federal court. Had he elected to do so he would have come within the traditional admiralty procedure of trial without a jury.

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[3] The basic thrust of the opinion of the majority of this Court in *Romero* v. *Int'l. Term. Oper. Co.*, 358 U. S. 354 (1957)—as was argued by petitioner's counsel to the trial court at the outset of the instant controversy (R. 8)—was that claims by seamen for personal injuries brought pursuant to the general maritime law were common law, rather than federal law, matters, and that they were historically maintainable as common law suits in the state courts and to be treated accordingly in the federal courts. See particularly *Romero*, supra, 358 U. S. at 362-3, 372-4.

See also, *Madruga* v. *Superior Court of California*, 346 U. S. 556 (1954), where this Court stated (346 U. S. at 560-561):

> "Admiralty jurisdiction is 'exclusive' only as to those maritime causes of action begun and carried on as proceedings in rem, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien. * * * It is this kind of in rem proceeding which state courts cannot entertain. But the jurisdictional act does leave state courts 'competent' to adjudicate maritime causes of action in proceedings 'in personam,' that is, where the defendant is a person, not a ship or some other instrument of navigation."

As was stated in that part of the opinion below which was unanimous, and there buttressed by authoritative decisions of this Court (306 F. 2d at 465, R. 66):

> "The common law is competent to give a common law remedy for breach of the obligation, created by the general maritime law, to pay maintenance and cure, namely, a money judgment against the operator of the ship. The saving clause thus permits a suit to that end in a state court, where a jury trial may usually be had."

However, petitioner had a second and distinct avenue of approach and entry. This involved an assertion of his claim for maintenance and cure as a common law "state" claim. In the circumstances here present he was able to append his maintenance and cure claim to his Jones Act claim arising out of the same incident, employment and injury. The Jones Act claim was a federal claim, entitled to jurisdiction and trial before a jury in the federal court, pursuant to the terms of the Jones Act statute and 28 U. S. C. § 1332. Inasmuch as a common law "state" maintenance and cure claim is entitled to a jury trial in state court, it would clearly be similarly entitled to a jury trial in federal court, if properly "pendent" to a related federal claim. It is this latter procedure that petitioner elected to follow, as demonstrated by the record, the pleadings (R. 2-5) and his claim before the trial court at the time this question was argued (R. 8-9).

Without question, petitioner's maintenance and cure claim was a valid, common law-state claim. In attaching it to a valid federal claim with which it was intertwined, petitioner was doing no more than invoking and relying on the well settled *Hurn* v. *Oursler* (289 U. S. 238; 1933) doctrine of this Court; *i.e.* that a state claim may be joined with a related federal claim for joint trial in a federal court.

Pendent jurisdiction of the federal courts over state common-law claims arising out of workingmen's personal injuries, when appended to substantially related damage suits under federal statutes for the same injuries, was recognized specifically in an opinion by Judge Mack in *Southern Pacific Co.* v. *Van Hooser*, 72 F. 2d 903, 911-912 (9th Cir. 1934). Judge Mack, who had authored the trial court opinion in *Hurn* v. *Oursler*, expressly recognized the applicability of the doctrine set forth by this Court's opinion in *Hurn* v. *Oursler* to the situation at bar.

Only one case (*Jacobs* v. *North Louisiana & Gulf R. Co.*, 69 F. Supp. 5; W. D. La. 1946) has been found by counsel dealing directly with pendent or ancillary federal court jur-

isdiction of a workingman's claim for personal injuries under the F. E. L. A. and a state compensation statute—the terrestrial equivalent of the seaman's Jones Act and maintenance and cure claims. In *Jacobs*, it was held that the federal court should determine a state workingman's compensation action, when coupled with a federal negligence action, even if the federal negligence claim should fail. The court stated (69 F. Supp. at 8):

> "The alleged facts and circumstances out of which the plaintiff claims recovery are the same under both statutes, the only difference being that, under the federal law, negligence must be shown and full damages are recoverable; whereas negligence or the lack of it makes no difference, but recovery is limited by the state statute. If the complaint has stated a lawful cause of action under the first and he should fail to sustain it with necessary proof, including his employment in interstate commerce at the time, then the question of his rights under the state act could properly be decided by this court. Having acquired jurisdiction because of the former issue, it would continue for decision of the latter. Siler v. Louisville & N. R. Co., 213 U. S. 175, 29 S. Ct. 451, 53 L. Ed. 753; Greene et al. v. Louisville & Int. R. Co., 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 97."[4]

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[4] The mere fact that the admittedly substantial "federal" claim under the Jones Act has been decided adversely to the petitioner does not divest the federal court of ancillary jurisdiction over the appended "state" claim for unpaid maintenance and cure.

In *Hurn* v. *Oursler*, 289 U. S. 238, 245 (1933) this Court stated: "[W]here the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground."

To the same effect are:

Armstrong Paint and Varnish Works v. *Nu-Enamel Corp.*, 305 U. S. 315, 324 (1938);

Musher Foundation v. *Alba Trading Co.*, 127 F. 2d 9, 11-13 (2d Cir. 1942, Clark, J. dissenting);

Hart & Wechsler, *The Federal Courts and the Federal System*—Note on Pendent Jurisdiction, pps. 802-809 (1953 Ed.).

It is respectfully submitted that the policy expressed and the result reached in the *Jacobs* case above cited is directly in keeping with the policies and decisions of this Court expressed with regard to jurisdiction of the federal courts and fair and efficient handling of damage suits by injured workmen, and that under the doctrines set forth by this Court on many occasions, the petitioner was entitled to pendent jurisdiction of his maintenance and cure claim and to a jury resolution of all of the disputed issues therein.

Once the civil side of the federal court accepts jurisdiction of the common law maintenance and cure claim as pendent to the Jones Act claim, it is constitutionally required under the Seventh Amendment to grant a jury trial to the common law claim. As was unanimously noted by the court below and not disputed by respondent, the maintenance and cure claim herein is a common law claim and would have been entitled to jury trial in the state court (306 F. 2d at 465, R. 66).

Petitioner did not need to, nor did he, rely at any time on the admiralty jurisdiction of the federal court to bring his maintenance and cure claim. If no admiralty jurisdiction had ever existed, petitioner would still have been fully entitled to bring the present action in precisely the same manner as he did bring it here.

In insisting on viewing the maintenance and cure claim as if it were and could only be a matter within the admiralty jurisdiction of the federal court, and ignoring the common law, "state," "pendent" basis for federal court jurisdiction and jury trial, the courts below committed error and deprived petitioner of his basic and inviolable right to a jury trial on the issues relating to his maintenance and cure claims.

In Response to Point III

Respondent here merely reprints Judge Friendly's comments below on the relationship of this Court's decision in *Hurn* v. *Oursler*, 289 U. S. 238 (1933) to the issues presented in the instant case.

Judge Friendly's contention was that the doctrine of *Hurn* v. *Oursler* could not effect civil, jury treatment of a maritime claim or transfer a federal admiralty matter to the civil side of the federal court. But, as aforestated, petitioner here sought merely to append a state civil claim to a substantial federal civil claim, and as to that, neither the opinions below nor respondent have cited any contrary authority, nor could they in light of *Hurn* v *Oursler* and the many cases following it.

However, even if petitioner had been doing what respondent and Judge Friendly allege—transferring an admiralty matter to the civil side—it is respectfully submitted that to serve the purpose of fair and efficient administration of justice, the federal courts have the power to direct and allow a jury trial on an intertwined and pendent maritime claim joined with another, civil claim which has such jury right as a matter of law. This power and authority was expressly exercised only recently by the Court of Appeals for the Second Circuit in *Bartholomew* v. *Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir. 1959), *cert. denied*, 359 U. S. 1000 (1959), where the court directed and allowed jury trial of an unseaworthiness claim arising out of the general maritime law which was joined with a Jones Act claim relating to the same incident.

Respondent's statement at page 13 of its brief that "the power to grant (a jury) trial (on a maritime claim) rests solely in the Constitution and Congress" stands totally unsupported by citation of authority, and if the sentence is meant to assert that this Court and the federal courts do not have the inherent power and authority to grant a jury

trial in the circumstances here involved, then it stands in direct contradiction to the result in *Bartholomew* aforestated.

In Response to Point IV

Respondent here attempts to demonstrate that a Jones Act claim and maintenance and cure claim arising out of the same incident are not "intertwined" and are each "wholly independent and distinct from the other" (Respondent's Brief, p. 17).

The degree and extent to which a Jones Act and maintenance and cure claim are in fact intertwined and related have been demonstrated and detailed at length in petitioner's main brief (see particularly Point II, pp. 13-19 and the numerous authorities cited). The intertwining of these related claims, and the problems of collateral estoppel, assignment of burdens of proof, and duplication of awards is so clear that every judicial and scholarly commentator on the issue has noted the importance and value of allowing joint jury trial of the Jones Act and maintenance and cure claim. Even Judge Friendly, the only voice raised in opposition to this result, conceded in the opinion below that such joint jury trial would indeed be "desirable" (306 F.2d at 470, R. 74). It is worth noting again that respondent remained totally unable to summon up or cite a single authority in support of its contention that the Jones Act and maintenance and cure claims herein are not intertwined.

Conclusion

Respondent's brief in opposition fails to set forth any persuasive authorities or arguments rebutting the numerous decisions and articles by learned commentators submitted by petitioner in full support of petitioner's position herein.

Petitioner was clearly deprived of a right to a jury trial on the issues relating to maintenance and cure herein. Such deprivation prevented a proper jury determination of the issues raised in the complaint relating to damages for failure to pay and provide maintenance and cure, which claim for damages was an integral part of the petitioner's basic Jones Act claim.

Petitioner is entitled to reversal of the result below, and a remand directing a new trial of all of the issues and claims set forth under the Jones Act in the complaint.

Respectfully submitted,

THEODORE H. FRIEDMAN
Counsel for Petitioner
1501 Broadway
New York, N. Y.

JACOB RASSNER
Attorney for Petitioner
15 Park Row
New York, N. Y.

THEODORE H. FRIEDMAN
JACOB RASSNER
BENJAMIN GLICKMAN
EVE M. PREMINGER
of Counsel.